(23,072)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1913.

## No. 199.

ROSA MARIA CALAF Y FUGURUL ET AL., APPELLANTS,

*vs.*

FEDERICO CALAF Y RIVERA.

APPEAL FROM THE SUPREME COURT OF PORTO RICO.

INDEX.


| | Original. | Print |
|---|---|---|
| Record from district court | 1 | 1 |
| Complaint as amended | 1 | 1 |
| Demurrer to complaint | 5 | 3 |
| Order overruling demurrer | 9 | 6 |
| Answer to complaint | 15 | 9 |
| Judgment | 19 | 12 |
| Opinion of Supreme Court, given by Chief Justice Mr. Hernandez | 20 | 13 |
| Decision of Supreme Court of Porto Rico | 45 | 28 |
| Petition for order granting appeal to United States Supreme Court | 46 | 28 |
| Order allowing appeal | 47 | 29 |
| Bond on appeal | 48 | 29 |
| Copy of citation and copy of return | 51 | 31 |
| Assignment of errors | 53 | 32 |
| Statement of facts in the nature of special verdict | 57 | 34 |
| Citation (original) | 72 | 45 |
| Clerk's certificate | 74 | 46 |


JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 31, 1913.

1 In the District Court of the Judicial District of Arecibo, Porto Rico.

Civil No. 1040.

ROSA MARIA, JOSÉ MIGUEL, GUMERSINDA DOLORES, MARIA HIGINIA CALAF FUGURULL Y CESAR VELAZQUEZ CALEF, Plaintiffs,

vs.

FEDERICO CALAF RIVERA, Defendant.

Nullity of Institution of Heir.

*Complaint.*

Now appear before the Court the plaintiffs named in the above entitled cause by their attorneys undersigned, and in compliance with the order of the Court of this date to strike out certain matter, they file this, their amended complaint, hereby alleging:

First.

That the four first named plaintiffs are natives of this Island and of age; and the fifth plaintiff, to wit, Cesar Velazquez Calaf, is also a native of this Island, and, being a minor, is represented herein by his natural father, Manuel Velazquez; all plaintiffs having full legal capacity to sue and be used.

Second.

That defendant, Federico Calaf Rivera is more than sixty years of age, a native of the Island of Porto Rico, and a resident in the town of Manati, belonging to this Judicial District, and he is the only testamentary heir of Don Salvador Calaf Serra, under which capacity he is sued in this cause.

Third.

2 That the five named plaintiffs are the only declared ab-intestate heirs of Juan Ramon Calaf y Martinez; the four first named, to wit, Rosa Maria, José Miguel, Gumersinda Dolores and Maria Higinia Calaf Fugurull, on their own right, and in the capacity of natural children and the fifth named, to wit, Cesar Velazquez in his capacity of natural grand-son, as son of Carmen Calaf Fugurull, who was a natural daughter, as the first named now deceased; and all of said plaintiffs are hereby suing in the capacity of heirs of Juan Ramon Calaf y Martinez.

Fourth.

That the said Juan Ramon Calaf was born in the city of San Juan, Porto Rico, on the 31st day of August, 1840, his parents

being Salvador Calaf y Serra and Maria Antonia Martinez, who, at the said date and the nine months prior thereto, professed the Catholic Apostolic Roman Religion, were of more than fourteen years of age, each of them, mentally capacitated, single, of free condition, lay, not tied to each other by any relationship, nor by reason of any crime, nor engaged any of them to another person in promise of marriage.

Fifth.

That said Salvador Calaf Serra recognized the said Juan Ramon Calaf y Martinez as his natural son, at the time when the latter received the Sacraments of Baptism and Confirmation: and the said Juan Ramon Calaf y Martinez died in the City of Ponce on the 9th, of October, 1895, having been held and considered, during his whole life as a natural son recognized by his father Salvador Calaf Serra.

Sixth.

That in the year 1890, the said Salvador Calaf Serra recognized as his natural son defendant Federico Calaf Rivera, who, at the time was forth five years old, and prior thereto had lived in
3 the company of his said natural father, and so continued living with him up to the time of his death, said recognition being by means of a notarial deed executed on the 17th, of June, before Notary Don José de la Torre in Manati.

Seventh.

That the said Salvador Calaf Serra died in Manati, P. R., where he had his domicile and habitual residence, on the 11th day of February, 1903, and left his open testament, which he executed ten months and some days prior to his death, on the 24th, of March, 1902, before the Notary of Utuado, Don Francisco I. Nater Rivera.

Eighth.

That in the said testament, Salvador Calaf Serra, after providing for certain pious and other legacies, and after declaring that during his marriage to Doña Petrona Vega, deceased, he had had no succession, instituted as his only and universal heir his said natural recognized son, defendant Federico Calaf Rivera, ignoring and omitting his natural grand-children, plaintiffs herein.

Ninth.

That all the property and estate left at his death by said Salvador Calaf Serra is in the possession of defendant, Federico Calaf Rivera, who, since the death of the former, has been in the full possession of all of said properties, enjoying the same, and appropriating for himself all of the fruits and products of the same.

In consideration of what has been alleged, plaintiffs pray the Court to render, at the proper time, a judgment against the defendant herein, declaring that the said institution of heir made in his

favor and contained in the testament of Salvador Calaf Serra dated March 24, 1902, to be null and void, and ordering as a consequence of such declaration, that the intestate succession of Salvador
4 Calaf Serra be opened, and that costs be also granted to plaintiffs against defendant.

San Juan, P. R., October 13, 1908.

(Signed) EDUARDO ACUÑA,
CARLOS LOPEZ DE TORD,
*Attorneys for Plaintiffs.*

I, Rosa Maria Calaf Fugurull, of twenty eight years of age, unmarried, a resident of this city, hereby declare under oath:

That I am one of the plaintiffs in this action; that I know the contents of the preceding complaint because I have read the same; that it has been prepared in accordance with the instructions which I have furnished to my attorneys, and that the facts alleged therein are true, of my own knowledge, except those of which I know through the information and belief of other persons, and which I believe to be true. That the other parties in this case are not resident of this Judicial District.

San Juan, P. R., October 13, 1908.

(Signed) ROSA MARIA CALAF.

N. 251. Signed and sworn to before me by Doña Rosa Maria Calaf twenty eight years old, unmarried, of this city, *to* whom I personally know, at San Juan, Porto Rico, this 13th day of October, nineteen hundred and eight.

(Signed) JULIO CESAR GONZALEZ,
[SEAL.] *Notary Public.*

Notified, with a copy, today, October 14th, 1908.

(Signed) ANTONIO ALVAREZ NAVA,
*Attorney for Defendant.*

Filed in my office today the 15th day of October, 1908.

(Signed) FELIPE PADILLA,
*Acting Secretary.*

5 In the District Court of the Judicial District of Arecibo, Porto Rico.

No. 1040.

ROSA MARIA CALAF et al., Plaintiffs,
vs.
FEDERICO CALAF RIVERA, Defendant.

Nullity of Institution of Heir.

*Demurrer to Complaint.*

Now comes Federico Calaf Rivera, defendant herein, by his attorneys Antonio Alvarez Nava and C. M. Boerman, and files his demurrer to the said complaint upon the following grounds, to wit:

First.

That the Court has not jurisdiction of the subject matter of the action.

This demurrer is based upon the following reasons to wit:

That it is not alleged in the said complaint that the pretended recognition of Juan Ramon Calaf has been declared by a judicial executory decision, an indispensable requisite to exercise hereditary rights. It would be, then, required, in order that this action could be successful, that the Court should begin by dictating that decision, if not previously rendered. If it was so rendered, it should be alleged in the complaint. If it was not, the Court cannot render it without hearing all parties who might be interested in the succession of Salvador Calaf. And, as it is not alleged in the complaint that Juan Ramon Calaf and Federico Calaf Rivera are the only heirs of Salvador Calaf, and, on the contrary, it is alleged therein, in the eighth paragraph, that Salvador Calaf was married, which implies some rights in favor of his wife, or of her heirs, it is obvious that the Court cannot render that decision without hearing, in a universal trial or proceedings all these parties who are or may be interested.

(*b*) Because that judicial decision could not have been rendered then nor can it be rendered now, because such decision would be against the laws applicable to the matter.

Second.

That plaintiffs have not legal capacity to sue.

The nullity of an institution of heir, on account of preterition (omission of other entitled to heirship) cannot be asked for by one not a legal heir; and natural recognized children not having that capacity until they are not so declared by an executory judicial decision, it is apparent that the successors of Juan Ramon Calaf, of whom, it is not alleged that he was a natural recognized son of Salvador Calaf by virtue of a judicial executory decision, have not the legal capacity to ask or pray for the nullity of the institution of heir, because he was omitted in the testament.

Third.

That there is defect of parties defendant.

Because there are not made defendants all these persons who may allege rights to the succession of Salvador Calaf.

Fourth.

That several causes of actions have been improperly joined.

Because it is attempted by this complaint to exercise at the same time the action of filiation and that of nullity of institution of heir, which actions cannot be joined, as provided by law.

7 **Fifth.**

That the complaint does not state facts sufficient to constitute a cause of action.

The reasons are the following:

(*a*) That it is not stated therein that Juan Ramon Calaf has been judicially declared a natural recognized son of Salvador Calaf.

(*b*) Because the allegation of the fifth paragraph, stating that Salvador Calaf "recognized as his natural son Juan Ramon Calaf Martinez during the days when the latter received the Sacraments of Baptism and Confirmation" is not properly an allegation of facts, but only a conclusion of law, and as such, it cannot produce any effect in the complaint, and must be taken as not written therein, and, therefore, not having any legal effect such allegation, there are not in the complaint facts sufficient to constitute a cause of action.

**Sixth.**

That the complaint is ambiguous, unintelligible and uncertain.

The allegation of the fifth paragraph of the complaint,

"that the said Salvador Calaf recognized Juan Ramon Calaf Martinez as his natural son, in the days when the latter received the Sacraments of Baptism and Confirmation,"

is ambiguous, because it does not express the facts constitutive of such recognition. It is unintelligible because, the recognition being a single, indivisible fact, it cannot be understood how it could have been made on two different dates.

And it is doubtful because the said contradiction originates the doubt as to what was the day in which the recognition was executed.

8 **Seventh.**

Defendant alleges further, as a demurrer, that the cause of action alleged in the complaint is prescribed in accordance with Articles 199 and 1840 of the Civil Code in force, 1964, 1939 and 137 of the original Civil Code.

(Signed) ANTONIO ALVAREZ NAVA,
C. M. BOERMAN,
*Attorneys for Defendant.*

*Notification.*

Today, the 14th, of October, 1908, we received a copy of the above pleading, and we were notified of the same.

(Signed) EDUARDO ACUÑA,
*Attorney for Plaintiffs.*

Filed in my office today, the 16th of October, 1908.

(Signed) FELIPE PADILLA,
*Acting Secretary.*

District Court of the Judicial District of Arecibo, Porto Rico.

Present: Hon. Ramon Quiñones, Judge.

ROSA MARIA CALAF et al., Plaintiffs,
vs.
FEDERICO CALAF RIVERA, Defendant.

*Order.*

The demurrers to the complaint filed in this case were called for hearing on the fifth day of December last.

The attorneys for both sides stated, extensively, their respective defenses and oppositions, as they thought convenient, the Court granting to them all the time they requested.

The defendant in support of the first ground of demurrer, that the Court has not jurisdiction of the subject matter of the action, alleges;

1. That in this case Law 11 of Toro should not be applied, but Law 10, Title 1st, Book 6th, of the Laws of Indias, which reads:

"On account of the injury which has been done in admitting proof upon filiations of Indians, and on account of it being in accordance to the law: We declare that Indians, children of married Indian women should be held and considered as of their husbands, and that proof to the contrary ought not to be admitted, and that as children of an Indian, they ought to follow the nationality of the father, although it be claimed that they are children of a Spaniard, and the children of Indian women not married ought to follow the nationality of the mother."

Defendant argues that, in order to apply this law, "Indian" is the "native" of Porto Rico.

2. Defendant alleges that although said Law of Toro be applicable, the Court has not jurisdiction because the complaint has not been preceded by a judgment declaring the recognition alleged in the complaint.

Plaintiffs oppose this ground of demurrer, and, among many reasons which we deem right, state the following:

"There is want of jurisdiction of the Court, by reason of the matter, of the persons, and is out of the question that an action upon the nullity of an institution of heir in Porto Rico falls under the jurisdiction of the District Courts. The Court has also jurisdiction upon the person of the defendant, in-as-much as he has been served with the summons, which is all that our Law of Procedure in force requires in order to acquire jurisdiction upon persons."

Plaintiffs further oppose the interpretation given by defendant to the word "Indian," as equivalent to the word "native," affirming it was always understood in the Law of the former Sovereign, that the word "Indie" served to designate the members of the Indian or Aborigine race of America; that the Legislation of Indies was enacted for the whole of Spanish America, and, therefore, for the Island of Cuba, and, however, the Supreme Court of Spain on May 10, 1860; May 21st., 1877; October 11, 1882; November 23, 1882,

applied to the cases decided by it the Law 11th of Toro; which law also applied in Porto Rico, according to the decision of May 26, (should be May 25) 1858.

And so it is; and the decision treating more clearly about this matter is the one dated May 10, 1860.

This last decision refers to two natural sons who were baptised in Havana during the years 1827 and 1828, who alleged that the deceased was their father, because they had been recognized as natural sons, and because they were raised and educated and treated with paternal affection.

The matter was taken on appeal to the Supreme Court, and Section of Indies of the Supreme Court of Spain decided;

"That question upon declaration of natural children should
11 be decided in conformity with the Law 11th, of Toro, that is, Law 1st., Title 5th, Book 10, of the Nevisima Recopiliacion."

Defendant in support of his demurrer bases his argument in the provisions of Royal Order, April 18, 1837, and of the 22nd of the same month, as well as in Article 2nd, additional, of the Constitution of the same year, giving to one and the others an extension which they lack.

With reference to said Royal Orders, it should be borne in mind that the same were issued before the said Constitution was in force, the latter having been signed in June 11, of the same year.

During the month of April the Constitution of 1812 was yet in force, and it had been temporarily put in force by Royal Decree of August 13, 1836.

The Constitution of June 17, 1837, certainly said, in its Article 2nd., additional:

"The provinces of Ultramar shall be governed by special laws."

Was this article a concession made to those, who since many years before, were laboring for the idea of descentraliátion in Ultramar, in so far as the laws of a politic and administrative character were related, or had it for its purpose to repeal everything relating to the civil status of persons born in Ultramar, and which was contained in the laws of the Kingdom prior to that date?

We believe that the laws of the Kingdom were in force in Porto Rico for the Spaniards, before the Constitution of 1837, and we found such a belief in that there was no law contrary to Partido 1st, Title 1, Law 15, which reads:

"All those who are under the sovereignty of the maker of the laws made for them, are held to obey and keep the same."

The very law of Indies on which the defendant supports
12 his demurrer, established a distinction between the Indian and the Spaniard residing in Indies; therefore, we are only bound to ascertain whether the native of Porto Rico was considered at time in which Juan Ramon Calaf was born, (August, 1840) as an Indian or as a Spaniard.

This question is settled by the Constitution of the year 1837, on which defendant bases his demurrer.

This Constitution reads: Title 1. Of the Spaniards, Article 1st.

There are Spaniards: 1st. All persons born in the dominions of Spain.

Article 4. The same Codes shall be in force throughout the Kingdom.

Since the Constitution of the year 1808, which, although it might be questioned that it never was in force, should be quoted, however, because of its being the first granted to the Kingdom, and because, in a general way, it served to demonstrate the generous ideas prevailing at that time towards the Hipano-American natives, in considering that it contained in its Article 87 the following words:

"The Spanish Kingdoms and provinces of America and Asia shall enjoy the same rights that the metropolis——"

and the Constitution genuinely Spanish of the year 1812, which declared, in its Article 1st., Title 1st:

"The Spanish nation is the reunion of all the Spaniards of both Hemispheres. Article 5. There are Spaniards: All free men born and domiciled in the Dominions of Spain, and their children. Title 2nd., Chapter 1st., The Territory of Spain. Article 10. The Spanish territory comprises, in the Peninsula—In America: The Island of Porto Rico and the adjacent Islands thereto."

"Chapter IV. Of the Spanish citizens. Article 18.

There are citizens those Spaniards who, by both lineages, bring their origin from the Spanish Dominions of both Hemispheres, and are domiciled in any town of the same dominions."

13 Since those Constitutions, we repeat, up to the last one applicable, expressed the same thought. Therefore, it would seem out of question that the native of Porto Rico, being constitutionally classified as Spaniards, the prohibitions established for the Indians by the law quoted by the defendant, cannot be made applicable herein.

The Spanish Constitution of May 23, 1840, contained the same equal statement that the one of 1837 did, and even the posterior ones of 1869 and 1876 declare in their first articles that there are Spaniards, all persons born in the Spanish Territory.

With reference to the second reason given by defendant in support of his first ground of demurrer, that is, the necessity of plaintiffs showing, previously by means of a judicial decision, their capacity, as alleged, there is no such formality required by Law 11th, of Toro, nor by any other posterior law applicable to the case.

With respect to the second demurrer, the lack of capacity, based on plaintiffs lacking the character of natural recognized children, such a reason is in-admissible, because, as alleged by plaintiff in opposing the demurrer, the lack of capacity to sue is the legal incapacity by reason of age, mental condition, etc., and does not refer to the right alleged.

The Supreme Court of Porto Rico, in the case of Juan Vicenty vs. Fernando Vazquez et al., in its decision of June 30, 1906, clearly settled the doctrine that,

"The right which a litigant may have or may pretend to have has no connection with his capacity to sue, and, therefore, the lack of that right does not constitute the ground of demurrer provided in Paragraph 2, of Article 105, of the Code of Civil Procedure."

The third demurrer alleged that there is a defect of parties
14 plaintiff, because all persons who might allege rights in the Succession of Don Salvador Calaf have not been summoned, should be over-ruled, because in this case the defendant can be the party defendant, as he and only himself might be injured by the nullity of the institution of heir made in his favor, and which is the only purpose of the complaint.

The fourth ground of demurrer, that several actions have been improperly joined, cannot be accepted, because in this case only one action is exercised, the action seeking the said nullity.

The fifth ground of demurrer, that the complaint does not state facts sufficient to constitute a cause of action, is founded in two reasons marked with the letters "*a*" and "*b*":

The first one has already been rejected at the end of the discussion, by the Court, of the reasons given to over-rule the ground of demurrer that it had not jurisdiction, and the second was discussed by the parties and decided by the Court when the motion to strike out was considered, and then the Court declared that the 5th Paragraph of the complaint was the expression of an essential fact. Therefore, it is proper to over-rule this ground of demurrer. The same ruling is made with reference to the sixth ground of demurrer, because the complaint is not confused.

The possession of the status as a natural son which is alleged Juan Ramon Calaf had, is a fact which has been stated with sufficient clearness and concision in Paragraphs 4th and 5th of the complaint.

The seventh ground of demurrer is not admissable, because
15 it would not be proper to hold that there is prescription of an action which is not exercised in this litigation.

Therefore, the demurrer filed herein by the defendant is hereby over-ruled, and defendant is given five days to answer the complaint.

Arecibo, January 14, 1909.

(Signed) RAMON QUIÑONES, *Judge.*

ISLAND OF PORTO RICO,
*Judicial District of Arecibo:*

In the District Court.

Civil. No. 1040.

ROSA MARIA, JOSÉ MIGUEL, GUMERSINDA DOLORES, MARIA HIGINIA CALAF FUGURULL, and CESAR VELAZQUEZ CALAF, Plaintiffs,

vs.

FEDERICO CALAF RIVERA, Defendant.

Nullity of Institution of Heir.

*Answer to the Complaint.*

Defendant Federico Calaf Rivera, by his attorneys Antonio Alvarez Nava and C. M. Beerman, appears before the Court and answering the complaint herein alleges:

First Defense.

I. That defendant has not information enough to admit or deny the facts alleged in Paragraph I, of the Complaint, and therefore deny the same.

II. That defendant has not information enough to admit or deny the contents of the Third Paragraph, and denies the same.

III. Defendant denies that Salvador Calaf Serra was the father of Juan Ramon Calaf, and that the mother of the latter, Maria A. Martinez, was of free condition at the date in which the latter conceived, and at the date when said Juan Ramon Calaf was
16 born; and with reference to the other allegations contained in said Paragraph Fourth, defendant has not sufficient information and therefore denies the same.

IV. Defendant denies that Juan Ramon Calaf has been at any time recognized as his natural son by Salvador Calaf Serra, and denies also that the former has ever been, during his life, or at any time held and considered as a natural recognized son of Salvador Calaf Serra.

V. Defendant denies that plaintiffs are grand-children of Salvador Calaf Serra.

Second Defense.

I. That Don Salvador Calaf Serra was born in Spain, and that he was a Spaniard up to the change of sovereignty in the Island.

II. Defendant alleges that Maria Antonio Martinez was of the negro race and a slave, and in information and belief alleges that she was a native of this Island.

Third Defense.

Defendant alleges upon information and belief, that even admitting the recognition of Juan Ramon Calaf, plaintiffs and defendant would not be the only intestate heirs of Salvador Calaf Serra, and that there is a defect of parties plaintiffs.

Fourth Defense.

That at the time the complaint herein was filed, there was another action pending, for the same cause and between the same parties litigant, before the District Court of San Juan, in which action a decision was given, and that between the date of said decision and that of the filing of the complaint herein there were not thirty days.

Fifth Defense.

That Juan Ramon Calaf died in Ponce in the year 1895,
17 when he was more than fifty years old, and in the full enjoyment of his mental powers.

Sixth Defense.

That plaintiffs herein filed a complaint against defendant herein, Federico Calaf, in the District Court of San Juan, in the month of March, 1906, alleging their pretended condition of grand-children and successors of Salvador Calaf Serra, and claiming in that capacity from Federico Calaf Rivera the half of the estate left by the former. That in the said case the Court rendered on the 28th of November, 1906, the following decision:

"In this case a hearing of the demurrer filed by defendant against the complaint was had before this Court, both parties attending; and the Court taking in consideration the complaint and said demurrer, which was submitted without oral discussion by the attorneys, is of opinion that, the facts and the law are in favor of the demurrer to the complaint, and in consequence the Court sustains the same, and holds that defendant is not obliged to answer the complaint, which is dismissed without permission to amend it, and with costs. Given in Court today, the 28th, of November, 1906, in San Juan, P. R. Signed: Pedro de Aldrey, Judge. Attest, Signed A. Marin, Acting Clerk."

This decision is in its full force and strength and no appeal or other recourse has been taken to review the same. And defendant alleges that in said decision it was declared that the father of plaintiffs, Juan Ramon Calaf, had not the status of natural recognized son of Salvador Calaf Serra, and defendant also alleges that the cause of action which is established by the present complaint is the same which was established and decided in the case already decided, to which above inserted decision refers.

Seventh Defense.

Defendant, Federico Calaf Rivera, alleges as special defense, that the cause of action herein has been prescribed in accordance
18 with the provisions of Articles 199 and 1840 of the Civil Code in force, 1964, 1939 and 137 of the original Civil Code.

Wherefore said defendant prays the Court, having answered fully to said complaint to dismiss the same and costs against plaintiffs.

San Juan, for Arecibo, January 18th, 1909.

ANTONIO ALVAREZ NAVA,
Pp. EMILIO GARCIA CUERVE,
*Attorneys for Defendant.*

C. M. BOERMAN.

UNITED STATES OF AMERICA,
*The President of the United States, ss:*

*Oath.*

I, Federico Calaf Rivera, of age, a widower, a resident and land-owner of Manati, on my oath declare:

That I am the defendant in this action, that I know the contents

of the preceding answer, because I read the same; that it has been prepared in accordance with the instructions which I gave to my attorneys, and the facts stated in the preceding answer are true, of my own knowledge, except those alleged upon information and belief, of other persons, which I believe to be true.

(Signed) FEDERICO CALAF.

Affidavit No. 163.

Signed and sworn to before me by Federico Calaf Rivera, whom I personally know, in this City of San Juan, today the 18th, of January, 1909.

(Signed) F. DE LA TORRE,
*Notary Public.*

19 District Court of the Judicial District of Arecibo, P. R.

Nullity of Institution of Heir.

ROSA MARIA, JOSÉ MIGUEL, GUMERSINDA DOLORES, MARIA HIGINIA CALAF FUGURULL, and CESAR VELAZQUEZ CALAF, Plaintiffs,
vs.
FEDERICO CALAF RIVERA, Defendant.

*Judgment.*

In this case the trial of which was held on the 21, 22, 23, 24, 26 and 27 of April, 1909, there appeared attorneys Eduardo Acuña, Carlos Lopez de Tord and Nemesio R. Canales, representing plaintiffs and attorneys Antonio Alvarez Nava and C. M. Boerman, representing defendant.

The Court heard the legal evidence presented by both parties, and the attorneys were given the time they asked to file written briefs, which they have presented extensively.

And the Court having considered in general the evidence and the allegations of law,

Holds, That the fact and the law are in favor of plaintiffs and against defendant, and that, therefore, it is proper to declare, and the Court hereby so declares that clause eight of the testament of Salvador Calaf Serra executed before Notary Don Francisco I. Nater y Rivera on the 24th of March, 1902, by which Federico Calaf Rivera was instituted an heir, is null and void and has no legal value or effect, and that the defendant should pay the costs of this litigation.

This decision was rendered today, July the 30th, 1909.

(Signed) RAMON QUIÑONES, *Judge.*

20 In the Supreme Court of Porto Rico.

No. 471.

ROSA MARIA CALAF FUGURULL et al., Plaintiffs and Appellees,
vs.
FEDERICO CALAF RIVERA, Defendant and Appellant.

Appeal Brought Against Judgment Rendered by the District Court of Arecibo.

Opinion of the court given by Chief Justice Mr. Hernandez.

SAN JUAN, PORTO RICO, *February 14th*, 1911.

On September 22, 1908, plaintiffs filed a complaint before the District Court of the Judicial District of Arecibo against defendant, seeking the nullity of an institution of heir, which complaint contains the following substantial allegations:

1. That the five first named plaintiffs are the only and universal intestate heirs of Juan Ramon Calaf y Martinez, the four first named to wit, Rosa Maria, José Miguel, Gumersinda Dolores and Maria Higinia Calaf Fugurull, on their own right and in their capacity as natural children, and the fifth, Cesar Velazquez Calaf in his capacity of natural grand-son, as a son of Carmen Calaf Fugurull, deceased, also a natural daughter of Juan Ramon Calaf y Martinez, with which capacity of heirs they bring their complaint.

2. That the said Juan Ramon Calaf was born in this City of San Juan on the 31st, day of August, 1840, his parents being Saivador Calaf Serra and Maria Antonia Martinez, who, at that time and during the nine preceding months professed the Roman Catholic Apostolic Religion, were of more than fourteen and twelve years of age, respectively, single, of free condition, lay, not bound by any kind of relationship, nor by reason of crime, nor bound, any of them to any other person on account of promise of marriage.

3. That the said Salvador Calaf Serra recognized Juan Ramon Calaf as his natural son during the days in which the latter
21 received the Sacraments of Baptism and Confirmation, and said Juan Ramon Calaf y Martinez died in the City of Ponce on the 9th, of October, 1895, having been held and considered, during his whole life as a recognized natural son of his father, Salvador Calaf Serra.

4. That in the year 1890, and by a public instrument executed in the town of Manati before Notary Don José A. de la Torre, on the 17th, of June, Salvador Calaf Serra recognized defendant Federico Calaf Rivera as his natural son, who at that time was about forty five years old, and who since some thirty years prior thereto had been living and continued to live in the companionship of Salvador Calaf Serra, up to the time of the latter's death.

5. That Salvador Calaf Serra died in Manati on the 11th, of February, 1903, leaving his open will, which he had executed on the 24th, of March, 1902, before Notary D. Francisco I. Nater Rivera.

6. That said Salvador Calaf Serra in his said will and testament, after bequeathing several pious legacies and after declaring that during his marriage with Petrona Vega, already deceased, he had had no children, he instituted as his only and universal heir the defendant, Federico Calaf Rivera, omitting and ignoring plaintiffs.

7. That all the properties left at his death by Salvador Calaf Serra are now in the possession of defendant, Federico Calaf Rivera, who, since the death of the former has been in the possession of said properties, enjoying them and appropriating for himself the fruits thereof.

The complaint ends with the prayer that a judgment be rendered, at the proper time, declaring the institution of heir in favor of defendant, contained in the said will of Salvador Calaf Serra, dated March 24, 1902, to be null and void, and also providing that
22 consequently, and by virtue of such a declaration, that the intestate succession of Salvador Calaf Serra be opened, and costs against defendant.

The allegation stated in the third paragraph was amended in the following manner: that the last words therein, to wit,

"as a recognized natural son of his father Salvador Calaf Serra,"

were changed by the following:

"as a natural son recognized by his father Salvador Calaf Serra;"

and by order of the Court, and on motion of defendant the following words of the allegations of paragraph four, already stated, were stricken out:

"and by a public instrument executed in the town of Manati before Notary Don José A. de la Torre on the 17th, of June."

To the complaint so amended defendant demurred for the following reasons;

1st. That the Court has no jurisdiction in the matter of the action.

2nd. That plaintiffs lack legal capacity to sue.

3rd. That there is defect of parties defendant.

4th. That several causes of action have been unduly joined.

5th. That complaint does not show facts enough to constitute a cause of action.

6th. That the complaint is ambiguous, unintelligible and uncertain.

7th. That the cause of action which is exercised is prescribed according to the provisions of Articles 199 and 1840 of the Civil Code in force, and 137, 1939 and 1964 of the primitive Civil Code.

The demurrer was discussed by the parties, and were over-ruled by the Court on its order of January 14, 1909, defendant being given five days to answer the complaint.

23 In doing that, Federico Calaf Rivera denied that Salvador Calaf was the father of Juan Ramon Calaf, and that Maria Antonia Martinez was of free condition on the dates when said Juan Ramon Calaf was engendered and born, and that both were under the conditions as stated in the second allegation.

He denied also, that Salvador Calaf at any time recognized Juan

Ramon Calaf as his natural son, and that he considered and held him as such at any time of his life; and, lastly, denied that plaintiffs are the grand-children of Salvador Calaf Serra.

And as further defense the said defendant alleged:

1st. That Salvador Calaf Serra was born in Spain and was a Spaniard up to the date of the change of sovereignty in this Island, while Maria Antonia Martinez was of negro race and a slave by condition, and, upon information and belief, a native of this Island.

2nd. That even admitting the recognition of Juan Ramon Calaf, plaintiffs and defendant would not be the only intestate heirs of Salvador Calaf Serra, for which reason there was defect of parties plaintiffs.

3rd. That at the time of filing the complaint there was another action pending before the District Court of San Juan, for the same cause and between the same parties, in which action a decision was rendered within the thirty days prior to the filing of the complaint herein.

4th. That Juan Ramon Calaf died in Ponce in the year 1895, when he was more than fifty years of age and in the plenitude of his mental capacity.

5th. That plaintiffs herein filed a complaint in the District Court of San Juan, against defendant herein, Federico Calaf in the month of March, 1906, alleging their pretended condition of grand-children and successors of Salvador Calaf Serra, and claiming, in such
24 capacity from Federico Calaf Rivera, the half of the estate left by the former, which case was terminated by decision of November 28 of that year, sustaining the demurrer filed against said complaint, and dismissing the same, without permission to amend, with costs, and that against such a decision declaratory of the fact that plaintiffs' father, Juan Ramon Calaf had not the status of a recognized natural son of Salvador Calaf Serra, no appeal or other recourse to review the same was ever taken.

6th. That the cause of action which is exercised by this complaint is prescribed according to the provisions of Articles 199 and 1840 of the Civil Code in force, and 137, 1939 and 1964 of the prior Civil Code.

The trial was held and the Court of Arecibo rendered its judgment on July 3*th*, 1909, the dispositive part of which is as follows:

*Holds.*

"That the facts and the law are in favor of plaintiffs and against defendant; and therefore, it is proper to declare, and the Court does hereby declare clause eighth of the testament of Salvador Calaf Serra, executed before Notary Don Francisco Y. Nater Rivera on the 24th, of March, 1902, to be null and without any legal value or effect, in which clause defendant Federico Calaf Rivera was instituted heir, and the costs of this litigation against said defendant."

Against said judgment defendant took the appeal which has been submitted to our consideration and decision, after both parties have alleged, orally and in writing, all what they deemed convenient for the defense of their respective rights.

The first ground of demurrer alleged, that the lower Court had no jurisdiction by reasons of the action, is clearly improper, be-
25 cause the question debated herein is that of the nullity of an institution of heir, and such matter falls within the jurisdiction of the District Courts, in an ordinary suit, as has been followed in this case. The reasons stated in the District Court in support of said demurrer, that there was not alleged in the complaint that the recognition of Juan Ramon Calaf was ordered by a judicial executory decision, would never justify the objection that there is lack of jurisdiction by the matter of the action, even supposing that such allegation is an indispensable requisite to hereditary rights.

The legal incapacity to sue, which is attributed to plaintiffs by defendant, cannot be derived, as the latter pretends, from the fact that Juan Ramon Calaf has not been declared a recognized natural son, by a judicial decision, because the absence of such a requisite, in the case of it being necessary to exercise the action seeking the nullity, would imply lack of cause of action, and not lack of capacity.

Neither *there is* a defect of parties defendant, in as much as the end of the complaint being the nullity of the institution of heir made in favor of Federico Calaf, in the testament of Salvador Calaf Serra, executed on March 24th, 1902, said defendant is the only party to whom, according to the complaint, the final decision which may be rendered in this case, would affect.

It is true that it is asked in the complaint that, as a consequence of the declaration of the pretended nullity, the intestate succession of Salvador Calaf Serra be opened; but such a declaration would not affect the proceedings that, in such a case would be instituted for the partition of the estate of Salvador Calaf.

There is no misjoinder of causes of action, that is, the
26 action of filiation, and the action of nullity of institution of heir, because the mere reading of the prayer of the complaint shows that the second of said actions has been the one exercised herein, not with-standing that plaintiffs have alleged that Juan Ramon Calaf, from whom they bring their cause is a natural son of Salvador Calaf, in order to show their capacity of heirs, with which they bring the action seeking the nullity aforesaid.

The Counsel for appellees alleges and repeats that they do not need to bring action of filiation, because there is an express and voluntary recognition made by Salvador Calaf Serra in favor of Juan Ramon Calaf, the originator of the plaintiffs' right of action, defendant having alleged the contrary proposition.

If the action seeking the nullity has been the only one brought, it is clear that there is no misjoinder of causes of action, which would neither exist even if an action of filiation had been exercised, as a basis for the action seeking the nullity of the institution of heir.

The other ground of demurrer, that the complaint does not show facts enough to constitute a cause of action, is based in that the same does not contain an allegation of the recognition by Salvador Calaf in favor of plaintiff's father, which requisite is an essential one to the existence of the action brought, and it is stated, as a reason in support of the statement, that the paragraph of the complaint relating the recognition is not the statement of a fact, but

a conclusion of law, which, granting that it be a fact it would not be properly alleged, and that the recognition, if existed, should have been recorded in the Civil Registry, and such recording should have been alleged in the complaint.

We have carefully read the paragraph of the complaint
27 relating to the recognition, which paragraph we have inserted hereinbefore as the 3rd, of the fundamental facts of the complaint, and we think that recognition as alleged is enough to constitute with the other facts stated in the complaint, the cause of action brought. That action is for the nullity of institution of heir in favor of defendant, because plaintiff's grand children of Salvador Calaf, the father of the father, were ignored; and the allegation that Salvador Calaf recognized Juan Ramon Calaf as his natural son in the days when the latter received the Sacraments of Baptism and Confirmation, and that said Salvador Calaf held and considered Juam Ramon Calaf during his life as such, show that Juan Ramon Calaf is a natural recognized son of Salvador Calaf Serra, and such recognition, attending to the terms in which it is alleged, should be presumed as made in a- authentic manner, because, in an usual and current language recognized natural son is the one who has been recognized in that manner. The very date in which that recognition was made, that is, the days when the Sacraments of Baptism and Confirmation were administered to Juan Ramon Calaf, seem to indicate that the recognition was made in any of said acts, and that it was made to appear in proper authentic manner, in the documents which then were extended to show the administration of these sacraments, at least, the Baptism.

At any rate although the form of the recognition has not been alleged expressly in the allegation referred to, the terms in which the same was written do not exclude the recognition in an authentic manner, and the proof to be presented at the trial might demonstrate the manner in which it was made. If from such proof it appears that the recognition was not made in an authentic form, then it would be proper to decide as we shall decide, whether or not the recognition, made in any other manner, was or was not
28 enough to serve as a basis for the present complaint.

On the other hand, having in consideration that an action seeking the recognition has not been brought, because the recognition is taken for granted, but the action seeking the nullity of the institution of heir in favor of Federico Calaf, and such action is precisely based in the existence of such recognition, we are of the opinion that the allegation of recognition in the firm in which it has been made, is enough for the pretended ends, without prejudice to the result of the evidence which be presented at the trial upon the form in which the recognition was made. If the action brought had been that seeking the recognition, perhaps our opinion would be a different one.

The complaint is not an ambiguous one, unintelligibel or uncertain in the part thereof relating to the recognition, because, as said before, the common and current sense of the allegation of such recognition indicates that Juan Ramon Calaf was recognized by Salva-

dor Calaf, as his natural son, in an authentic manner, during the days when the sacraments of Baptism and confirmation were administered to the latter, and that he was held and considered as a recognized natural son by his father Salvador Calaf.

Truly, the last stated condition was not necessary if the recognition of Juan Ramon Calaf was made in a public and solemn form; but such redundancy would never lead to the conclusion that the recognition was made in another form, and much less to the conclusion that the allegation of the recognition is ambiguous, unintelligible and uncertain.

The action brought has not prescribed, because it is an action seeking the nullity, and the legal provisions quoted in support of the demurrer refer to prescription of the action of filiation and recognition which plaintiffs alleged, repeatedly, is not the
29 one they have brought in their complaint, and we are not authorized to change the terms in which the judicial debate has been placed.

We consider, therefore, that for the reasons stated therein, the order of the Court of Arecibo, of January 14th, 1909, over-ruling all grounds of demurrer, is in conformity to the law. And we shall proceed to discuss the following questions proposed by the appellant in his brief:

1st. That no other proof of the recognition of Juan Ramon Calaf by Salvador Calaf y Serra, should have been accepted that the public and solemn instrument containing the recognition of Juan Ramon Calaf, or an executory judgment ordering such recognition.

2nd. The defense of Res Adjudicata.

3rd. Prescription.

4th. The defense of Lis Pe-dens.

5th. The defense of defect of parties plaintiffs.

With reference to the first legal question, we are of the opinion that it was all good, as one of the essential facts of the complaint, the recognition of the filiation of Juan Ramon Calaf by Salvador Calaf Serra, without the action for recognition being brought, and such recognition having been denied, as it has been denied by the defendant, that the only evidence which ought to have been admitted would have been the public and authentic document showing such recognition, or an executory judicial decision ordering it.

In the case of Amsterdam vs. Puente, which was decided on June 17th, 1910, we said:

"We think that out of the provisions of the Civil Code formerly in force, as well as from the practice and jurisprudence upon the matter, it can properly be concluded that without an act which in an authentic form shows the willingness of the father of giving to his son such a status, the son has only a right of action to compel the father to confer upon him such a status. Article 135 of
30 the Spanish Civil Code, and 189 of the Civil Code of Porto Rico provide the cases in which a father may be compelled to recognize his illegitimate son. He can only be obliged to make such recognition through an action, and it may be said that such an action would be unnecessary only in those cases in which there be

solemn acts, on the part of the father which come to show that such an obligation has been fulfilled. It is clearly deduced from those articles that although a father had executed, as in the present case, a series of acts tending to show that a certain person was his son, it cannot be said, however, that he recognized such person, within the legal sense of the word recognition. If the father could be obliged to do it, then it would be necessary to admit that before being obliged, the desideratum has not been obtained. Under such circumstances, and until there is not a solemn act, or some declaration from a court, it cannot be said that the son has been recognized, nor can it be affirmed that he has acquired the civil status of a recognized natural son."

In the case of Justo Puente y Amsterdam vs. Felix Puente y Solano, et al., which was decided on June 18, 1910, the legal question was discussed as to whether or not in the special proceedings for the declaration of heirs, provided by the law approved on March 9, 1905, evidence could be admitted to show the recognition of natural filiation, which evidence had not been admitted by the Court below, and in deciding the point we said:

"In our opinion the lower court did not commit the alleged error. In order that appellant In this case be successful in alleging her condition of recognized natural daughter, and as such to be declared an heiress, it should be necessary to show that her recognition had been made voluntarily and solemnly by her father, without room for doubts, or, that having a right to be recognized in accordance with the law, and the father having failed to make the recognition in a solemn manner, or, refusing to do so, the daughter had obtained an executory judgment in her favor from a competent tribunal, after following the proper procedure in such a controversy. It has
31 been the constant practice that when the father fails to recognize, or refuses to make the recognition, the son should appear in the proper court exercising the action of filiation to obtain from the court that it might declare in a judgment what the father failed or refused to declare in a solemn manner."

In the case of Emilia Rijos Cordova vs. Teresa Folgueras Rijos, decided on June 21 of the same year, we said:

"The natural son derives his right from the recognition, and in order that the recognition be understood as made, and producing all of its legal effects, it is necessary that it be made in a solemn manner by the father, with the firm willingness of doing it, and that an authentic record thereof shall remain. When the father executed acts tending to establish his paternity which, by themselves did not constitute a solemn recognition, and of which no authentic and self evident proof remained, under the laws of Toro; when the cases provided in the old Civil Code, Article 137 happened; and when the acts referred to in Article 189 of the Revised Civil Code shall occur, then it was and it is proper to bring the action of filiation, and the recognition should appear in the solemn executory judgment of a competent tribunal. Parents who, in fulfilling their duty, wish to transmit to their children their names and property which might belong to the children, should cause the recognition to appear

in an authentic manner, a self evident form, such as the recording of the birth, or a public document, a will, or a declaration made in a solemn form before an officer or tribunal, etc., so that the recognized natural son might show his condition as such in the same manner that the legitimate son. When parents fail to make the recognition of their natural children in the stated manner, then the latter should exercise the action of filiation, and obtain a judicial declaration of their right."

In accordance with the legal doctrine stated in deciding the mentioned cases, it becomes necessary to exercise the action of recognition when the father has not made it, or when he refuses to make it, and it can only be such action prescinded when of such recogni-
32 tion there is authentic and self evident proof, or it has been declared by a judgment from a competent tribunal. Hence, as in the present case the action of recognition is not the one exercised, and it only has been alleged the character or capacity of Juan Ramon Calaf as a recognized natural son of Salvador Calaf Serra, as one of the essential facts of the complaint, which allegation, attending to the legal and grammatical meaning of its terms, implied a recognition made in a solemn and authentic form, it is obvious that all evidence which does not tend to justify or show a recognition made in such a form, is inefficacious in law to ends sought by plaintiffs.

The testimony of witnesses on the part of plaintiffs tending to show acts of recognition of the filiation as natural son by Salvador Calaf Serra, with reference to Juan Ramon Calaf, the document presented by the plaintiffs, and which was so debated at the trial, document which does not contain any date and which reads as follows:

"I recognize as my natural son Juan Ramon Valentin and this shall be disposed as in the day in which he was baptized.—Salvador Calaf."

The certificate of the recording of Juan Ramon Calaf in a book of confirmed, as has been pretended to show, made in the following terms:

"519. Ramon, h. n. (n. s.) of Salvador Calafa and Ma. Antonia Martinez.—P. Pedro Elias."

The declaration of several witnesses tending to show the authenticity of the first of the documents cited; and the examination of the same by chemical and caligraphic experts, would be very pertinent proofs in a suit upon filiation and recognition of Juan Ramon Calaf; but there are not such in a case in which filiation and recognition are supposed to appear in an authentic and self evident manner, and which, being uncontrovertible, to a certain extent, are out of discussion.

33 It cannot be admitted that in accordance with the Law 11 of Toro under the regime of which Juan Ramon Calaf was conceived and born, a recognition made in any manner, direct or indirect, not appearing in a self evident form, can constitute title to exercise inheritance rights. Such a theory would be equivalent to hold that the interested person bringing it is the one called upon to appreciate which and how many acts suffice to determine his recog-

nition, and to interpret the meaning and extent of those acts, manifestations and words constituting the recognition. Such appreciation belongs to the judicial authority in a controversy upon recognition, and not in any other kind of controversy. We say so in order that the debate might be frank and open with a complaint showing all the facts constituting the recognition, and reserving to the defendant the right to make a complete defense against such recognition.

As the action seeking recognition has not been the one brought herein, the defendant has been deprived of his right to oppose, in this case, the proper defenses against such action, and, therefore, he has been deprived of a substantial means of defense; and the deprivation of such right in the case at bar is so important, that the defense of prescription would completely bar the action seeking recognition, as we will show.

We repeat that this action being one seeking the nullity of an institution of heir, there cannot be applied to it legal provisions relating to the action seeking recognition of a natural son; and for that reason we hold that as the action seeking nullity is based in the recognition of natural filiation in favor of plaintiffs, and such recognition does not appear in the record in a self evident and authentic form, the action seeking its declaration ought to have been
34 brought previously to, or jointly with the action seeking the nullity of the institution of heir, in order that the question of prescription could have been alleged and decided.

Counsel for appellee say in their brief:

"The present complaint does not establish an action for filiation; our action is solely one seeking the nullity of institution of heir, and we cannot admit any question as to prescription than those which might make reference to the said action of nullity, and to those the provisions of the law cited in opposition thereto do not apply. But independently of that, we understand that in the matter of recognition of natural children born under the regime of the Laws of Toro, the allegation of prescription is applicable only in the cases of compulsory recognitions. And the reason is obvious: recognitions made in accordance with the legislation preceding the first Code did not require any formality, the free willingness of the father being sufficient. Once such willingness was expressed, no formality was required in order that such recognition could produce its legal effects. Evidently, prescriptions cannot be alleged when a legal status is claimed against one who is in possession of such a status, for, as it is well established, possession supposes lack of prescription."

As we have seen, the very appellee admits the propriety of the allegation of prescription in a case of compulsory recognition and, as the case of recognition of Juan Ramon Calaf would be a compulsory recognition, because Salvador Calaf during his life did not recognize him in an authentic and self evident manner, as his natural son, even ignoring him in his will, and defendant, the successor of Salvador Calaf, now contests such recognition, therefore we can see that

the action of recognition of Juan Ramon Calaf is susceptible of prescription.

The exception of prescription to the action of recognition of natural children may be alleged, although they be born under the regime of the Law of Toro, as we decided on June 25, 1909, in the case of Gual vs. Gual.

35 We said therein:

Plaintiffs Luis and Alfonso having originated their right to be recognized as natural sons before the Spanish Civil Code was in force, as well, and as a consequence, their action to obtain a declaration of their right, both right, and action should be left subsisting with the extension and terms provided in the former legislation; but such right and such action cannot last longer than the time provided by the Code. Extension and terms are quite different notions than duration; the two first words referring to the scope and strength of a right or action, the third one relating to the time when right and action may live and have effect. There is no conflict or contradistinction in the provisions of rule four referred to. Should there be any doubt as to its meaning, it would be vanishing by reading the statement of motives of the Spanish Civil Code, which says:

"But if it is just to respect the rights acquired under former legislation, even if the same have not been enforced, no consideration of justice demands that the exercise of such rights, a posteriori, or their duration and proceedings to make them effective, be exempted from the provisions of the Code."

We accept the doctrine of the Supreme Court of Spain contained in its decision of September 23, 1898, holding that the recognition affects the very existence of the right, and for that reason we said, in the case of Gaul vs. Gaul, as follows:

"As may be seen it is sufficient for Luis and Alfonso Gual to show, through any probatory means allowed by law, the express or implied recognition of their natural filiation by Tomas Gual under Law 11 of Toro, as construed by the jurisprudence of the Supreme Court of Spain, without requiring the plaintiffs to produce such evidence as provided under Section 135 of the old Civil Code as amended

36 by Section 189 of the Revised Code, in order to compel their father presumptive or his succession to make the recognition desired, for in such case rights originating under the provisions of the Toro Law would be prejudiced, thus violating Rule 1 made and provided for the application of both of said Codes."

We have examined the decisions of the Supreme Court of Spain dated April 11, 1906, December 28th, of the same year, and April 2, 1909, which, on account of their being rendered after the change of sovereignty took place in this Island, should not be held by us as having the authority of legal doctrine, but only the weight which the reasons in which the same are established may give them.

The last quoted decision clearly states—

"that it is true that at the trial the defense of prescription was not raised, nor any article of the Code is quoted, in this appeal, which

may refer to the duration of the actions, excepting Article 137, which is not applicable;"

and the same Court in its decision of December 19, 1902, in a case of a natural daughter born under the régime of the Law of Toro, affirmed that,

"it was not exact that Article 137 of the Spanish Civil Code does not provide a term to bring the action seeking recognition, for it expressly fixed four years immediately after claimant has reached his majority."

We regret not to accept all the appreciations of said respectable tribunal in interpreting rule four of the provisions for the application of the Spanish Civil Code in relation to Article 137 of said Code.

We understand that the integrant and necessary elements of filiation and recognition of natural children are those relating to their capacity to be recognized and to the acts necessary to a determination of such recognition, elements which are different in the Law of Toro, in the Spanish Civil Code and in the revised Code; and
37 we understand besides that the duration of the action to judicially enforce said recognition is an accident which might always be modified by the legislator, under certain conditions, provided that the person having or pretending to have such a right be not absolutely deprived of the action to obtain the declaration of the right.

If a reasonable term to bring such action is granted, before the privation of the right comes, then there would be no reason to complaint of any grievance. In the case of Emilia Rijos Cordova *vs.* Teresa Folgura, decided on June 21, 1910, we said: It has been held by the Supreme Court of the United States:

"This Court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect. Hawkins v. Barney, 5 Pet. 451; Jakoon v. Lamphire, 3 id., 280; Sohn vs. Waterson, 17 Wall, 596; Christmas vs. Rusell, 5 id.; 290; Sturges vs. Crowninshield, 4 Wheat, 122.

And it is difficult to see why, if the Legislature may prescribe a limitation where none existed before, it may not change one which has already been established. Terry vs. Anderson, 95 U. S. 632."

In agreement with the above doctrine, the Spanish Civil Code in its Article 1939, and the Revised Code, in its Article 1840, contain the following provisions:

Prescription commenced before the publication of this code, shall be regulated by the laws prior to the Code, but, if since the date it was put in force the time therein required for prescription should run, then prescription shall produce its effect, although said prior laws should require a greater period of time."

The action for the recognition of Juan Ramon Calaf has been extinguished by the statute of limitations, either following the pro-

visions of Article 137 of the Spanish Civil Code, or 199 of the Revised Code.

38 But even admitting that neither the provisions of the one Code or of the other, which regulate the duration of the action seeking recognition be applicable to the case at bar, then we have the Law 63 of Toro fixes the period of 20 years for the prescription of personal actions, of which character participates the action of recognition or filiation.

We do not find in the legislation in force at the time of the birth of Juan Ramon Calaf any legal provision excepting from prescription the action for recognition, which, on the other hand we cannot see why it might be imprescriptible by its own nature; if that be the case families would be subject to disturbance, because the descendant, in any degree, of a natural son, entitled to recognition, might enforce such a right against his successors.

Let us examine the defense of Res Judicata.

It appears from the record that on March 14, 1906, Rosa Maria, Jose M. Dolores and Maria Calaf, Gerardo Velazquez y Calaf, represented by his father Manuel Velazquez, and Jose and Adela Calaf, Alianated, represented by their brother Jose Miguel Calaf, filed a complaint before the District Court of San Juan, praying a judgment in their favor and against defendant Federico Calaf Rivera, in which it should be declared that Ramon Calaf was a natural son of Salvador Calaf Serra, and that as such he was entitled to inherit the half of his estate; that plaintiffs were, as only heirs of Ramon Calf, the only persons entitled to enjoy the rights enjoyed by him, that defendant Federico Calaf Rivera should render an account to plaintiffs of the property and products of the estate of Salvador Calaf, after a liquidation thereof; and, lastly, that Federico Calaf Rivera should deliver to plaintiffs the half of the estate left by Salvador Calaf Serra, and the products therefrom since the year 1902, and should pay the costs of the litigation.

39 The defendant filed a demurrer to the above complaint on the ground that the said plaintiffs have no legal capacity to sue; that the complaint did not state cause sufficient to constitute a cause of action; that the complaint was ambiguous, and that the action on recognition was barred by the Statute of limitations.

After the demurrer filed to the complaint was heard, the Court rendered its decision, which reads as follows:

*Decision.*

"In this case the court heard the demurrer of defendant to the complaint, attorneys for both sides being present; and the court, after taking in consideration the said complaint and the said demurrer which was submitted to the court without oral discussion by counsel for both sides, is of opinion that the facts and the law are in favor of the demurrer to the complaint and in consequence, hereby decided to sustain the said demurrer, that defendant is not obliged to answer the complaint, which is hereby dismissed, without permission to amend, and with the costs.

Given in Court today, 28th of November, 1906, at San Juan, P. R.
(Signed) PEDRO DE ALDREY, *Judge.*"

According to the certificate from the Clerk of the said Court, the decision inserted above is firm, as no recourse against it has been brought.

In the first place, we ought to declare that we are treating not of an opinion given by the Judge, but of a final decision which has decided against plaintiffs the rights or claims submitted for discussion in the complaint, as it is dismissed, without permission for amendment, with costs against plaintiffs.

Such declaration should not be taken as an opinion but as a judgment, as judgment is defined in Article 188 of the Code of Civil Procedure. This judgment should be presumed as registered, because the Secretary of the Court has the duty of registering it, according to Articles 231 and 234 of the Code of Civil Procedure, and there is the legal presumption that he fulfilled that duty, a presumption which appears marked with number 15 in Article 102 of the law of Evidence approved March 9th, 1905, although that presumption might be controverted with other evidence, which was not done by plaintiffs, who, did not even except to the evidence introduced by defendant in support of his plea of res judicata. And that presumption is so much stronger in the present case by the reason of the Secretary of the Court certifying that the decision was firm, because no recourse had been taken against the same, and from that statement it may be decided that the decision had been registered.

So we have that it has been already held and decided according to the terms of the judgment above mentioned, and with the character of res judicata, that Ramon Calaf Martinez is not a natural son of Salvador Calaf Serra, and that neither himself, nor the plaintiffs in this case, as his heirs, are entitled to the inheritance of Salvador Calaf Serra, and that Federico Calaf Rivera is not under the obligation of rendering any account to plaintiffs of the inheritance of Salvador Calaf and its products, after a liquidation of the same is made, nor to deliver to plaintiffs the half of the estate left by Salvador Calaf Serra, with the products thereof since the year 1902.

Are those declarations covered by the presumption of res adjudicata in the present case?

Article 1219 of the Civil Code in force says:

"In order that the presumption of the res adjudicata may be valid in another suit, it is necessary that between the case decided by the sentence and that in which the same is invoked, there be the most perfect identity between the things, causes, and persons of the litigants, and their capacity as such."

There is identity of things in the two cases to which we refer, because the ultimate end of both is no other that the participation in the inheritance of the estate of Salvador Calaf; the cause of action is the same, that is, the recognition as natural son of Juan Ramon Calaf, which is asked for in the one case and is taken

for granted in the other; and, lastly, the litigants are identical, with the only difference that the minor plaintiff appears with distinct names in both cases, and in the second suit Jose and Adela Calaf do not appear as they did on the first one, for the reason that both had died and had been succeeded in their rights by the plaintiffs in the second case, as appear from the record.

If the present complaint be successful, the principal ground of the judgment would be the recognition of Juan Ramon Calaf as natural son of Salvador, Calaf, with the consequential rights to such recognition, and the judgment would contradict and destroy the effect of the previous final and firm judgment.

If the plea of res adjudicata be overruled, we shall always have that the fundamental fact of the complaint, that is, the recognition of Juan Ramon Calaf as a natural son, has been decided by prior judgment in a negative sense, and such decision cannot be contradicted nor discussed in the present suit, with which the present action seeking the nullity of the institution of heir, would be groundless.

With reference to the demurrer of lis pendens, it has been shown that in another case before the District Court of San Juan, brought by the same plaintiffs, the Court decided that it was not competent to take the matter in consideration, and that if the complaint was not amended within ten days, its decision be registered as a judg-
42 ment for the purpose of the appeal, and it was so registered on September 21, 1908, as no amendment was made to the complaint and the time granted therefor, as well as the extension granted, elapsed without any amendment having been made.

It also appears that the complaint in this case was filed in the District Court of Arecibo on the 22nd of September, of that year; that Federico Calaf was notified and summoned on the 23rd, of said month, and that the demurrer of lis pendens was alleged at the time of making the answer to said complaint on January 18, 1909.

Applying to these facts Article 348 of the Code of Civil Procedure providing that a case should be considered as pending since its commencement until its final decision on appeal, or until the time to appeal has expired, unless the judgment has been prior executed, then we have that the decision of the District Court of San Juan, referred to, which was registered as a judgment on September 21, 1908, was rendered at the instance of the defendant, who, for such reason could not bring any appeal against it; and, in so far as the plaintiffs are concerned, they fulfilled the said decision by the mere effect of appearing before the District Court of Arecibo with the same complaint, and it cannot be alleged, as appellant herein does, that he could take an appeal against said decision in so far as it granted authority to amend the complaint, because the decision had been already registered as a judgment when plaintiffs had already left the time to amend lapse without making any amendment.

Therefore, there is no lis pendens, as alleged.

Neither is it proper to sustain the demurrer that there is defect of parties plaintiff, a demurrer which is based, as appears in the appellant's briefs, in that Antonio Cortado, and Juan Gregory are as-

signees of a 50 per-cent of the properties and sums of any
43 kind which by reason of this litigation plaintiffs might obtain.

After examining the evidence upon this subject, we find the following proofs:

1st. A written agreement dated in San Juan the 12th of June, 1907, by which Rosa Maria Calaf, considering herself an heiress of her grand-father Salvador Calaf, as a daughter of Juan Ramon Calaf, authorized Cortada and Gregory to investigate everything in connection with her alleged rights to that estate, to procure the necessary documents and take the proper action to enforce such rights, and, also to employ counsel to represent her, with the stipulation that the expenses which might be incurred shall be on account of those commissioned, to whom, as a compensation for their services, she obliges herself to pay one half of the net portion of the inheritance.

2nd. Another contract dated in Ponce June 21st, under identical terms and stipulations, between Jose Miguel Calaf and Maria Calaf, and the said Gregory and Cortada.

3rd. A written agreement made before Notary Jose G. Torres on October 12th, 1907, by which Cortada admits to have received from Jose Herrera two hundred and fifty dollars to pay the expenses incurred in making the claim of hereditary rights of the heirs of Juan Ramon Calaf against Federico Calaf, Cortada binding himself to return to Herrera the money advanced, and by the services rendered by the latter to pay the sum of one thousand dollars, provided that the litigation be terminated by settlement or by a decision in favor of complainants.

Those contracts do not imply any assignment of hereditary rights in favor of Cortada Gregory and Herrera, who might be parties interested in the result of the litigation but such interest does not authorize them to appear in the litigation and support the action exercised by plaintiffs.

44 Although the appellant also alleges in support of his appeal that the Court below erred in the appreciation of the evidence relating the recognition of Juan Ramon Calaf by Salvador Calaf Serra, and this point has been fully debated, we do not deem ourselves authorized to discuss and decide the import or value of the different elements of proof brought to the trial in defense and in opposition to such recognition, because, as already stated, the action which has been exercised herein is not of filiation and recognition of a natural son, but one seeking the nullity of institution of heir, and in this case no other proof should have been admitted than that tending to justify that the recognition appeared in a solemn and authentic form, or by a decision, which proof has not been presented at the trial. Besides, with reference to the recognition, which was denied by the decision of November 28, 1906, there is the presumption of res adjudicata, which we are bound to respect.

For the reasons stated, it is proper to repeal the decision rendered by the District Court of Arecibo on July 30, 1909, and to dismiss the complaint, with the costs against plaintiffs.

(Signed) JOSE C. HERNANDEZ,
*Chief Justice.*

45 In the Supreme Court of Porto Rico.

No. 471.

ROSA MARIA CALAF et al., Plaintiffs and Appellants,
vs.
FEDERICO CALAF RIVERA, Defendant and Appellee.

Appeal Against a Decision by the District Court of Arecibo.

*Decision.*

SAN JUAN, PORTO RICO, *February 14th*, 1911.

This Court has carefully examined the transcript of the record in the above named case, and after having given careful consideration to the written and oral allegations of both parties, it hereby decides, by the reasons stated in the preceding opinion, to repeal the judgment of the District Court of Arecibo, rendered on the 30th of July 1909, and which has been appealed to, and dismiss hereby the complaint in this case, with costs to plaintiffs and appellees. And that a copy duly certified of this decision and of the opinion be sent to the said District Court to the proper ends.

Thus we pronounce, order and sign.

JOSE C. HERNANDEZ.
J. H. MacLEARY.
ADOLPH G. WOLF.
EMILIO DEL TORO.

46 In the Supreme Court of Porto Rico.

No. 471.

ROSA MARIA CALAF FUGURULL et al., Plaintiffs and Appellants,
vs.
FEDERICO CALAF RIVERA, Defendant and Appellee.

*Petition of an Order Granting an Appeal to the Supreme Court of the United States.*

Now appear the plaintiffs and appellants herein, by their solicitors Carlos Lope de Tord, Eduardo de Acuna Aybar, Nemesio R. Canales and Hartzell & Rodriguez Serra, and respectfully appeal against the decision rendered in the case above stated on the 14th of February of the present year, to the Supreme Court of the United States.

And they hereby petition this honorable Court that such appeal be allowed by order of the Court, and that the Court may fix the amount of the bond which your petitioners will have to furnish on said appeal, and, also that the Court issue a citation and all other orders which might be proper in conformity to law and in con-

nection with said appeal, in order that it might be properly perfected and made effective.

(Signed) CARLOS LOPEZ DE TORD,
EDUARDO ACUNA,
NEMESIO R. CANALES,
HARTZELL & RODRIGUEZ SERRA,
*Solicitors for Appellants.*

47 In the Supreme Court of Porto Rico.

No. 471.

ROSA MARIA CALAF et al.
vs.
FEDERICO CALAF RIVERA.

*Order.*

SAN JUAN, P. R., *June* 22, 1911.

The appeal which is petitioned by solicitors Messrs. Carlos Lopez de Tord, Eduardo Acuña, Nemesio R. Canales and Hartzell & Rodriguez Serra, on behalf of Rosa Maria Calaf, et al., plaintiffs, to the Supreme Court of the United States, against the decision rendered by this Court on the 14th of February 1911, in the above named case, is hereby allowed: the amount of the bond to be furnished by appellants within the legal time is fixed in the sum of one thousand dollars, said bond to be approved by the Hon. Chief Justice or by any of the Associate Justices of this Court: and it is hereby ordered that the appellants submit to the approval of this Court a draft of a statement of the facts in the nature of a special verdict in accordance with the provisions of the Statutes in force upon the matter, and the term sixty days for the preparation of the record which should be transmitted to the Supreme Court of the United States, is hereby granted.

Thus the Justices of the Supreme Court decided and signed.

(Signed) JOSE C. HERNANDEZ.
EMILIO DEL TORO.
J. H. MacLEARY.
PEDRO DE ALDREY.

48 In the Supreme Court of Porto Rico.

ROSA MARIA CALAF et al.
vs.
FEDERICO CALAF Y RIVERA.

*Bond on Appeal.*

Know all men by these presents that I, Rosa Maria Calaf y Fugurul, as principal and the Fidelity and Deposit Co., of Maryland,

as sureties are held and firmly bound unto Federico Calaf Rivera his attorneys, successors or assignees, in the sum of one thousand dollars, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our successors, representatives, and assigns, firmly by these presents.

Whereas, recently at one term of the Supreme Court of Porto Rico, in a suit pending before the same, in which Rosa Maria, Jose Miguel, Gumersinda Dolores, Maria Higinia Calaf y Fugurull, and Cesar Velazquez Calaf, a minor, were plaintiffs and appellees, and Federico Calaf y Rivera was the defendant and appellant, a judgment was rendered against said plaintiffs and appellees, and that said plaintiffs and appellees have taken an appeal to the Supreme Court of the United States to repeal said judgment, which appeal was allowed by the Supreme Court of Porto Rico; and, also, said plaintiffs and appellees asked the said Court that upon their furnishing of the bond which in the sum which might be fixed, a citation be issued to the said Federico Calaf Rivera, admonishing him to appear before the Supreme Court of the United States on said appeal, and it was also asked from said Supreme Court of Porto Rico that a transcript of the record be prepared and that said appeal to the Supreme Court of the United States be perfected.

49 Whereas, a citation addressed to the said Federico Calaf Rivera is to be issued admonishing him to appear before the Supreme Court of the United States in Washington. Now therefore, the condition of the obligation is such that if said Rosa Maria Calaf and the other plaintiffs in this case shall prosecute said appeal to effect and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and virtue.

(Signed) ROSA MARIA CALAF.
FIDELITY AND DEPOSIT CO. OF MD.
R. R. TODD, *Attorney in Fact.*

Countersigned:

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,
F. M. WELTY, *Agent.*

**No. 123.**

UNITED STATES OF AMERICA,
*Island of Porto Rico, ss:*

Signed and sworn to by Rosa Maria Calaf, married, of age, to whom I personally know, to day, the 19th of July, 1911.

[SEAL.] EDUARDO ACUÑA, *Notary.*

50 *Acknowledgement of Surety.*

ISLAND OF PORTO RICO,
*City of San Juan:*

On this 20th day of July, 1911, before the subscriber a Notary Public of the City of San Juan, Porto Rico, duly commissioned and qualified came F. M. Welty as agent, and R. H. Todd as Attorney in fact, of the Fidelity and Deposit Company of Maryland, to me personally known to be the individuals and officers who executed the preceding instrument, and they each acknowledge execution of the same, and being by me duly sworn severally and each for himself, deposeth and saith, that they are the said officers of the Company aforesaid, and that their signatures as such officers were duly affixed and subscribed to said instrument by the authority and direction of the said Corporation, given in the Power of Attorney executed by said Company on the 22nd day of June, 1906, the original of which is on file in the office of the Treasurer of Porto Rico.

In testimony whereof I have hereunto set my hand and affixed my official seal, at the City of San Juan, Porto Rico, the day and year above written.

[SEAL.] GABRIEL GUERRA,
*Notary Public.*

51 *Citation.*

In the Supreme Court of Porto Rico.

No. 471.

ROSA MARIA, JOSE MIGUEL, GUMERSINDA DOLORES, MARIA HIGINIA Calaf Fugurul, and Cesar Velazquez Calaf, Plaintiffs and Appellants,

vs.

FEDERICO CALAF RIVERA, Defendant & Appellee.

UNITED STATES OF AMERICA,
*The President of the United States, ss:*

To Federico Calaf y Rivera, Defendant and Appellee, and to Antonio Alvarez Nava and Jorge V. Dominguez, his attorneys:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington, D. C., within sixty days from the date of this writ, pursuant to an appeal filed in the office of the Secretary and Reporter of the Supreme Court of Porto Rico, in a certain cause lately pending in said Court, wherein Rosa Maria, Jose Miguel, Gumersinda Dolores, Maria Higinia Calaf Fugurul, and Cesar Velazquez Calaf, are plaintiffs and appellants, and you are defendant and appellee, to show cause, if any there be, why the judgment rendered ther-in

against the said defendants and appellants should not be reversed and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. James H. MacLeary, Associate Justice of the Supreme Court of Porto Rico, at the city of San Juan, P. R. this 8th, day of August, in the year of our Lord one thousand nine hundred and eleven.

(Signed) S. C. BOTHWELL, *Marshal.*
*Associate Justice of the Supreme Court of Porto Rico.*

Attest:

J. HERNANDEZ USERA,
*Secretary and Reporter of the Supreme Court of Porto Rico.*

52 Received copy today August 10, 1911.
ALV. NAVA & DOMINGUEZ.

Received this writ this 8th day of August, 1911, and served the same by delivering a true copy thereof to the within named Jorge V. Dominguez, one of the attorneys of record. This at San Juan this 10th day of August, 1911.

(Signed) S. C. BOTHWELL, *Marshal.*

53 In the Supreme Court of Porto Rico.

ROSA MARIA CALAF et al., Appellants,
vs.
FEDERICO CALAF Y RIVERA, Appellee.

Come now the above named appellants, by Hartzell & Rodriguez Serra, Eduardo Acuña and Carlos Lopez de Tord, their solicitors, and they file the following assignment of errors upon which they will rely upon the prosecution of their appeal from the decision of this Honorable Court on the 14th day of February, 1911, in the above entitled case.

First. That the said Court erred in deciding in favor of the said defendant appellee, Federico Calaf y Rivera and against these appellants, in that it failed to apply the law of Toro which was in force at the time of the birth and life of the ancestor of appellants, under which the claim in this cause is urged with reference to the recognition of natural children.

Second. The Court erred in holding and deciding that a necessity existed for the institution of an action to establish filiation in cases where the father has voluntarily recognized a child although such recognition should not be made to appear in a public deed or instrument.

Third. The Court erred in deciding that a recognition made by a father over his signature in a private document when such recognition has been corroborated by reasonable proof and the con-

stant use of the paternal surname is not sufficient to constitute a legal recognition according to the law of Toro.

Fourth. The Court erred in determining that a private document in which a recognition of a child is made is not an authentic and solemn evidence of such recognition, and that the same has
54 not that degree of solemnity which the law requires in that behalf.

Fifth. The Court erred in deciding and holding in this action, in which the nullity of a will and the enforcement of hereditary rights are asked by parties who base their claim on the recognition of a natural son made by a testator in a private document corroborated by proofs of its genuineness and the uninterrupted use of the paternal surname, and which recognition was made in accordance with and under the regime of law of Toro, that no other evidence should have been admitted by the Court at the trial than such as would demonstrate that such recognition appeared in an authentic or solemn form or in a judicial decision, and that without such evidence plaintiffs appellants could not recover judgment in such action.

Sixth. The Court erred in deciding that the declarations of witnesses tending to prove acts of recognition as a natural son of Juan Ramon Calaf by Salvador Calaf, that the private document signed by the latter, the certificate of the inscription of the former in the book of confirmations of the Church, the declarations of witnesses tending to demonstrate the authenticity of said private document and the evidence of experts with reference to said document, can only be used as evidence in a suit for filiation and recognition, but that the same cannot be used in action based on the assumption that such recognition and filiation actually existed and in which action hereditary rights under such recognition are demanded.

Seventh. The court erred in deciding that in the institution of an action seeking the nullity of the will of the actual father of their ancestor appellants have deprived appellee of the right to urge the plea of prescription in a case in which a valid recognition voluntarily made by the father existed.

55 Eighth. The Court erred in deciding that in this case a judicial recognition by a court was required as a basis for the action not-with-standing that a voluntary recognition was proven as the basis therefor.

Ninth. The Court erred in deciding that the action of filiation in this controversy had prescribed because such action has never been instituted and the basis of plaintiffs' claim for relief was upon a recognition voluntarily made by the father in due accordance with the laws in existence at the time of such case of recognition.

Tenth. The court erred in failing to hold that the certificate of confirmation offered as evidence of recognition was not sufficient to establish the status of natural recognized children.

Eleventh. The Court erred in deciding that the judgment or decision urged as matter of res *indicata* was presumed to have been registered.

Twelfth. The Court erred in deciding that the sustaining of a de-

murrer to a complaint under the circumstances disclosed by the record, herein, constitute a legal basis for the plea of res judicata.

Thirteenth. The Court erred in deciding that in this action and in the action pleaded by defendant as res judicata hereof, that there was such identity of action or parties as would justify sustaining such plea of res judicata.

Fourteenth. The Court erred in holding that the said plea of res judicata interposed by the defendant in this cause was valid and efficacious for the reason that as disclosed by said plea, the nature and character of the action which was the basis of said plea, was entirely different from that urged herein.

Whereof- appellants pray that the said judgment and decision of the Supreme Court of Porto Rico by reason of the foregoing
56 errors and further great and manifest errors appearing upon the face of the record and proceedings herein, may be held reversed, set aside and held for naught.

Amended: Carlos López de Ford;—Stricken out: "Emilio."

EDUARDO ACUÑA,
CARLOS LÓPEZ DE FORD,
HARTZELL & RODRIGUEZ SERRA,
*Attorneys for said Plaintiffs and Appellants.*

57 In the Supreme Court of Porto Rico.

471.

ROSA MARIA, JOSÉ MIGUEL, GUMERSINDA DOLORES, MARIA HIGINIA Calaf Fugurull y Cesar Velazquez Calaf, Plaintiffs and Appellees,

vs.

FEDERICO CALAF RIVERA, Defendant and Appellant.

*Statement of Facts in the Nature of Special Verdict.*

SAN JUAN, PORTO RICO, *December* 15, 1911.

A.

In the present case brought before the District Court of Arecibo, plaintiff- presented proofs tending to show the following facts:

1. That four of the plaintiffs are natural children of Juan Ramon Calaf Martinez and the other plaintiff is a grand-son of the said Calaf Martinez.

2. That the five plaintiffs are the only and universal heirs, judicially declared as such, of Juan Ramon Calaf Martinez.

3. That Juan Ramon Calaf Martinez was born in the city of San Juan, Porto Rico, on the 31st of August, 1840; his parents being Salvador Calaf Serra and Maria Antonia Martinez.

4. That among the books of records of baptism existing in the archives of the Cathedral Church of San Juan, Porto Rico, it is not

found the original book containing the records of baptism corresponding to the years 1840-41, but there existed in place of the same a book which is said to be a copy of the original book, which has no official statement of its beginning or ending.

58 5. That in the said book said to be a copy of the original, there is not found the certificate of baptism of Juan Ramon Calaf Martinez.

6. That Juan Ramon Calaf received the sacrament of confirmation administered by the Bishop of the diocese of Porto Rico, Fray Francisco de la Puenta, on the 19th of March, 1847, and the certificate of confirmation is found among others executed the same day in the original book of confirmations existing in the archives of the Catholic Cathedral Church of San Juan, Porto Rico, and that the same literally reads as follows:

"519—Ramon, h. n. of Salvador Calafa y Maria Antonia Martinez Padrino, P. Elias."

7. That the initials "h. n." were intended to indicate natural son (hijo natural,) it being the custom of the functionaries of the Church to define in this form the condition of a natural son of the person confirmed.

8. Those claimed to be the parents of Juan Ramon Calaf Martinez at and before the time of his birth were able to contract matrimony without dispensation.

9. That Salvador Calaf Serra recognized as his natural son Juan Ramon Calaf Martinez, through and by means of a private document which literally copied reads as follows:

"I recognize as my natural son Juan Ramon Valentin, and the same shall be effective as of the day of his baptism.

SALVADOR CALAF."

10. That said document was written and signed by Salvador Calaf Serra.

11. That the said document came to the possession of Feliciana Megia, the foster mother of Juan Ramon Calaf, and then afterwards came to the possession of Carlotta Figueroa, to be delivered to Rosa Maria Calaf, which was done in the year 1907, when the said

59 Rosa Maria Calaf returned from Colombia where she had been residing.

12. That Juan Ramon Calaf Martinez during his entire life used the name of Calaf, transmitting the same to his heirs, the plaintiffs in this action.

13. That Salvador Calaf gave aid and support to Ramon Calaf Martinez during the latter's life, visiting him frequently during his minority while he was in the care of Feliciana Mejia in the city of San Juan, sustaining correspondence with him when he established his home in the city of Ponce, visiting him at his barber shop in Ponce which was carried on under the name of Barberia Calaf, where Salvador Calaf was presented to the family and friends of Ramon Calaf as his father, and who thereupon publicly treated him as his

son during a visit to the said city of Ponce made by Salvador Calaf at the time of the celebration of the Fair in 1882.

14. That Juan Ramon Calaf Martinez died in the City of Ponce in October, 1895.

15. That Salvador Calaf Serra died in Manati, Porto Rico, in February, 1903, leaving an open will which was executed on the 24th of March, 1902, and in the eights clause of which he instituted Federico Calaf Rivera, defendant herein and his recognized natural son, as his sole and universal heir, without making any mention of Juan Ramon Calaf nor of plaintiffs herein.

B.

The defendant at the proper time proposed evidence tending to show:

1. That the ancestor of plaintiff, Juan Ramon Calaf, was not born on the 31st of August, but on the 17th of December, 1840.

2. That he is not a natural son of Salvador Calaf but of
60 Maria Antonia Martinez, who was a slave of Captain Don Juan Castaños, and that he was baptized as such.

3. That the book of baptisms which copy is kept in the archives of the parish of the Cathedral of San Juan, Porto Rico, is used by the employees of said archives to issue copies of the entries as they are requested.

4. That the document presented by plaintiffs upon the recognition made by their ancestor is false.

5. That Salvador Calaf never saw Juan Ramon Calaf nor gave him any succor or aid at any time, nor had with him any kind of relations.

6. That Salvador Calaf executed prior to the will of March 24th, 1902, two other wills, and in all of them he reiterated the recognition of his son Federico Calaf, and instituted him as his sole and universal heir, without making any mention of plaintiffs or their ancestor.

7. That on the 14th of March, 1906, another complaint had been filed against defendant Federico Calaf Rivero by the successors or heirs of Juan Ramon Calaf Martinez before the District Court of San Juan, Porto Rico, in which complaint they pray that Juan Ramon Calaf Martinez be declared a natural son of Salvador Calaf Serra, and that defendant be sentenced to deliver to plaintiff one half of the estate left by Salvador Calaf.

8. That defendant interposed against said complaint the demurrer that plaintiffs had not legal capacity to sue; that the complaint did not state facts sufficient to constitute a cause of action; that, besides, the complaint was ambiguous, and that the action for recognition was prescribed.

9. That in the said case the following decision was rendered on Nov. 28th, 1906, against which no recourse has been interposed.

61 "In this case the Court heard the demurrer of defendant to the complaint, attorneys for both sides being present; and the court, after taking into consideration the said complaint and the

said demurrer, which was submitted to the court without oral discussion by counsel for both sides, is of opinion that the facts and the law are in favor of the demurrer to the complaint, and in consequence, hereby decides to sustain the said demurrer, that defendant is not obliged to answer the complaint, which is hereby dismissed without permission to amend, and with the costs."

C.

1. The complaint of March 14th, 1906—referred to in fact No. 7, corresponding with paragraph marked with letter "B," copied literally reads as follows:

No. 689.

"DOLORES CALAF et al.
vs.
FEDERICO CALAF Y RIVERA.

Upon Recognition of Children and Other Matters.

*Complaint.*

Now appear before the court the following plaintiffs; Dolores Calaf, José Calaf, Rosa Maria Calaf, Maria Calaf, Gerardo Velazquez Calaf, a minor represented herein by his father Manuel Velazquez, and José and Adela Calaf, mentally incapacitated, represented herein by their next friend, their brother José Miguel Calaf: all of said plaintiffs represented by their attorneys Henry F. Hord and Jacinto Texidor, and they file this their complaint, and allege:

That plaintiffs, Adela, Maria, Dolores, José, Rosa Maria and José Miguel Calaf, are children of Mamon Calaf, who died in Ponce on the 10th of October, 1905.

That in addition to the above mentioned, Ramon Calaf had, also, a daughter, named Carmen Calaf, who is the mother of plaintiff Gerardo Velazquez represented herein by his father Manuel Valazquez, and that said Carmen Calaf died prior to the filing of this complaint leaving no other children or descendants than the said Gerardo Velazquez, a minor.

That Don Salvador Calaf y Serra, who was a resident of San Juan, Porto Rico, first, and then, of Manati, P. R., during the years 1840 and 1841, had love relations with Maria Antonia Martinez,
62 who was a slave of Capt. D. Juan Castaños, and that out of such love relations Juan Ramon or Ramon was born on the 17th of December, 1840, at San Juan, Porto Rico.

That the said Ramon, the son of Salvador Calaf and Maria Antonia Martinez, was baptized in San Juan, Porto Rico, and in the record or entry of his baptism the name of his mother, only, was registered; that the said Ramon was also confirmed in accordance with the Catholic rite, and his confirmation was recorded, and in the entry thereof it was stated that he was a natural son of Don Salvador Calaf and Maria Antonia Martinez.

That Ramon was delivered to the care of Bernarda Baez as a son of Salvador Calaf, and he lived in the company of said Bernarda Baez for a long time, until having learned a trade he moved to the city of Ponce, where he resided up to the time of his death.

That during the minority of said Ramon Calaf, his father Salvador Calaf Serra assisted him, though not liberally, and held and considered him as a son, attending to the payment of his strict expenses and wants, as well as the expenses of learning his trade, and permitting him to use his name.

That said Ramon Calaf always enjoyed the status and condition of a natural son of Salvador Calaf Serra.

That Ramon Calaf, at the time of his death, left as his only children, plaintiffs named Calaf, Carmen Calaf, the mother of plaintiff Gerardo Velazquez, and they are the only heirs of Ramon Calaf.

That Salvador Calaf Serra died in 1902 without having made in a public instrument or in his testament the recognition as his natural son of Ramon Calaf.

That said Federico Calaf Rivera is a natural son of Salvador Calaf Serra and Joaquina Rivera, and plaintiffs have no knowledge as to whether or not he appears in the record of his baptism as recognized, and from the investigation made by plaintiffs, it appears that there is no record of his baptism; but plaintiffs allege that defendant, either by his fortune or his ability, obtained from his father a recognition in a public instrument, and that such recognition was made to the prejudice of Ramon Calaf, who was a son of equal legal condition and class to that of Federico.

63 That said Federico Calaf Rivera unjustly and to the prejudice of the rights of plaintiffs, has been and is in possession of all the properties which constitute the estate left by Salvador Calaf, and he has been and is using the products thereof and appropriating the same for his only benefit since 1902.

That Federico Calaf Rivera knew long since the death of Salvador Calaf Serra, that Ramon Calaf was a son of said Salvador Calaf Serra; and knows that plaintiffs are the only descendants of Ramon Calaf; and holding them in such capacity, he helped some of the plaintiffs at the time of the death of Salvador Calaf, for the same of their relationship. But said Federico Calaf Rivera has refused and now refuses to make a recognition, in a public and efficacious manner, of the condition of natural brother which Ramon Calaf had with reference to him, and the consequent relationship of his nephews, plaintiffs herein.

That plaintiffs, as children and grand-children respectively of Ramon Calaf represent the rights of their father and grand-father in the properties which comprise the inheritance or estate of Salvador Calaf Serra, and in the products thereof.

That Federico Calaf Rivera, defendant herein, has never delivered to plaintiffs, totally or in part, the estate of Salvador Salaf, or the products thereof, even knowing full well that plaintiffs are entitled to the participation of one half of that estate.

That plaintiffs have tried on different occasions to obtain from Federico Calaf Rivera a recognition of their condition and relation-

ship, and a recognition of the condition of Ramon Calaf, as a natural son of Salvador Calaf Serra, and they have also tried to obtain from said Federico Calaf Rivera the delivery to plaintiffs of their participation in the inheritance of Salvador Calaf Serra.

That plaintiffs have been unable to find, until two months ago, the necessary proofs to bring this action, and for that reason they have been under the impossibility of exercising their rights up to the said time.

For all of which reasons they pray the Court to render a judgment in their favor and against defendant declaring that Ramon Calaf was a natural son of Don Salvador Calaf, and that as such he had the right to inherit him in the one half of his estate; that plain-
64 tiffs, as the only heirs of Ramon Calaf, are entitled to the same rights to which Ramon Calaf was entitled with reference to the estate of Salvador Calaf, and that defendant Federico Calaf, should render an account to plaintiffs of the inheritance of Salvador Calaf and the products thereof, after a liquidation, and, lastly, that Federico Calaf should deliver to plaintiffs one half of the whole estate left by Salvador Calaf Serra and the products thereof since the year 1902, and that he pay the costs of this litigation.

San Juan, Porto Rico, March 14, 1906.

(Signed) HENRY F. HORD AND
JACINTO TEXIDOR,
*Attorneys for Plaintiffs.*"

2. The demurrer filed against the above complaint reads as follows:

"Defendant, Federico Calaf Rivera, married, land-owner, and a resident of San Juan, by his attorney Ricardo Lacosta, appears before the Court, within the time granted to answer the complaint, and files hereby his demurrer to said complaint, for the following reasons, to wit:

**First.**

That plaintiffs have not legal capacity to sue. Paragraph 2nd, Article 105 of the Code of Civil Procedure in force.

First. It appears from the complaint that plaintiff- named José and Adela Calaf are insane, and that plaintiff named Gerardo Velazquez is a minor. It also appears from the complaint that on behalf of the insane one so called, Miguel Calaf appears as their next friend, and on behalf of the minor, his father Manuel Velazquez appears. These appearances are illegal, because, in accordance with the provisions of Article 56, of the Code of Civil Procedure in force, when a minor or an insane person is a party to a litigation his appearance in court should be by his general tutor or by his special guardian appointed by the Court.

Second. It appears from the complaint that plaintiffs call themselves children and grand children of one Ramon Calaf, who died in Ponce on October 19, 1905, and claim inheritance rights and

exercise hereditary actions upon the estate which as they claim, belongs to their father, Ramon Calaf.

This estate of Ramon Calaf, as appears from the complaint
65 is an unsettled estate, and as such, all actions originating therefrom should be adjusted in their prosecution *to* the law providing special proceedings, in force since March 9, 1905. It appears from the complaint that said special law has not been complied with, and that the complaint has been filed in violation of Article 51 of the said special law, which provides that in all proceedings affecting an estate the succession shall be represented by the executors or administrators of the estate of the deceased.

Second.

That the complaint does not allege sufficient facts to constitute a cause of action.

Paragraph 6, of Article 105 of the Code of Civil Procedure.

The complaint alleges that Salvador Calaf had love relations with Maria Antonia Martinez, a slave of Captain Castaños; that out of such relations, Juan Ramon, or Ramon was born on the 17th of December, 1840, that Salvador Calaf died in 1902 without having made, in a public deed or in his testament, a recognition of his natural son, Ramon Calaf; that all the properties of Salvador Calaf are in the possession of defendant Federico Calaf by virtue of the inheritance of his father; that plaintiffs represent the rights of their father and grand-father Ramon Calaf, son of Salvador Calaf, deceased, and it is prayed from the Court, that Federico Calaf should recognize Ramon Calaf as a natural son of Salvador Calaf, deceased, and also, his right to inherit the one half of the latter's estate; that plaintiffs are the only heirs of Ramon Calaf, and that as such, and by the right of representation, the one half of the estate be delivered to them, as the said estate was on the date of the death of Salvador Calaf, with the products thereof from the year 1902.

It is necessary, in accordance with the provisions of Art. 37 of the Code of Civil Procedure, that there be a cause of action in order to allege it, and in the present case, even admitting the complaint as it has been presented, not accepting however, nor recognizing its facts and allegations as valid, it appears from the same that there is no cause of action for the following considerations, to wit:

First. Law 11th, of Toro reads: And that it might not be doubted who are natural children, we ordain and direct that such are
66 those who, at the time of their birth or their conception, their father could marry their mother justly without dispensation, provided that the father should recognize the child as his own, as he has not had the woman who had the child, with him in his house, nor, she was the only woman, and we ordain that the child who has the qualifications mentioned be held as a natural child.

Second. Ramon Calaf has not the condition of natural son. It appears from the complaint that Ramon Calaf, born on the 17th of December, 1840, was the son of a slave, and as such he followed

the condition of his mother, and by the right of accession he belonged to the owner of his Mother. Law 2nd, Tit. 21, Partida 4th.

Third. The mother of Ramon Calaf being a slave, as appears from the complaint, and her son following her condition, the one and the other were not persons, but things, subject to the commerce of men, whose ownership was acquired and transmitted in the same manner *that* other property. Law 2nd. Tit. 21, Partida 4th.

Fourth. Maria Antonia Martinez, as a slave, had not the liberty nor the will to obligate herself, could not give her consent to any act or contract, could not be married, and to be able to marry she was required, first, to be freed, in addition to obtain, the consent of her lord and owner. Law 5th, Tit. 22, Partida 4th.

Fifth. Salvador Calaf and Maria Antonia Martinez could not contract marriage without dispensation at the date when Ramon Calaf was conceived or born, because, in addition to the condition of the mother, a slave, at that time Salvador Calaf was less than 25 years old, and, therefore, a minor, as appears from the complaint, and as a minor, he could not contract marriage without the paternal consent and advice, as provided in Law 18, Tit. 2, Book 10, of the Novisima Recopilacion.

Sixth. Ramon Calaf, born in 1840, could not have the condition of natural son of Salvador Calaf and Maria Antonia Martinez. The law of the Partidas was modified by the Law 11th, of Toro, already cited, which provided that a natural son could only be the one born out of parents who, at the date of the conception, or of the birth of the child, could marry each other without legal permission or dispensation, provided that the father would recog-
67 nize the child as his own. From the complaint it appears, and it may be seen at the end of the final paragraph of the second page, that Salvador Calaf died in 1902, without having made the recognition of Ramon Calaf, as his son. It is not sufficient, therefore, in order to be qualified as a natural child, under Law 11th, of Toro, that the father and mother could have married each other without dispensation, but that it is further required that the father should recognize the child as his own; and in the present instance not only was it impossible for a free man to marry a slave woman, but it appears from the complaint that Salvador Calaf never recognized Ramon Calaf as his son.

Seventh. All actions seeking the recognition of natural children can only be brought during the life of the presum-tive parents, acofding to Article 137 of the Civil Code formerly in force, and it appears from the complaint that Salvador Calaf died in 1902, four years ago. Said Article 137 provides that these actions can only be brought after the death of the parents in the two following cases: 1st, if the father died during the minority of the child. 2nd, if after the death of the father there might appear a document in which he expressly made the recognition. None of these requisites appear from the complaint, on the contrary, it appears therein that Ramon Calaf died in 1905, three years after the death of Salvador Calaf, which occurred in 1902, and it also appears that Ramon Calaf, born in 1840, and died in 1905 was 65 years old when he died, and

lastly, it also appears that Salvador Calaf has not left any document in which he expressly recognised Ramon Calaf as his son.

Eighth. But in the present case it is not Ramon Calaf who brings the action upon recognition of a natural child, nor is this action addressed against the person supposed to be the father, to wit, Salvador Calaf. It appears from the complaint that Salvador Calaf died in 1902, and that three years thereafter, in 1905, Ramon Calaf died.

It appears from the complaint that this action seeking recognition is brought by those who claim to be children and grand-children of Ramon Calaf, and the action is not addressed against Salvador Calaf, but against his son and testamentary heir, Federico Calaf Rivera.

It is attempted, therefore, to obtain the recognition of a right by virtue of which a living person takes the place and exercises the rights and actions of a dead person. This right called of
68 representation, has not been recognized by the law on favor of natural children and descendants.

Article 137 of the former code, which has no precedents in our legislation, establishes, for the first time, the action upon recognition of natural children, but does not leave undetermined the time to exercise it, but limits it to the life of the parents, with the two exceptions quoted.

Said article, does not authorize that the action pass to the heirs, and the silence of the law on this point cannot be interpreted as an omission, but as the deliberate purpose of refusing the right, and thus establish a difference which should exist between legitimate and natural filiation. See said Article 137 and compare it with 115 of the said Code.

Third.

That the complaint is ambiguous. Paragraph seventh of Article 105 of the Code of Civil Procedure.

First. Because the age of each plaintiff is omitted, as well as their status, and filiation, to the effects of Articles 54 and 57 of the Code of Civil Procedure, and Article 137 of the former Civil Code.

Second. It is said in the complaint that "plaintiffs could not find, until two months ago the necessary proofs to establish this action, and could not have been enabled to bring the action which they now bring until that time."

This paragraph contains an essential allegation of the complaint, which is alleged in very general and ambiguous manner. In the present case all proofs are not sufficient to establish the action, the proof should be of the character required by Article 137 of the former Civil Code, second paragraph; hence, it is necessary to state in the complaint what proofs plaintiffs found two months ago, not only because that is required by the legal provision contained in the exceptions in said article, but because the complaint alleges that Salvador Calaf died without having made any recognition of Ramon Calaf, as his natural son.

Third. It appears from the complaint that Salvador Calaf died in 1902, and as the Spanish Civil Code was repealed in said year,

and from the first of April the new Civil Code is in force in
69 Porto Rico, it is ambiguous not to state exactly the year, month and day of the death of Salvador Calaf.

When hereditary rights are claimed the dates of the birth and of the death should be stated with all precision and accuracy.

Fourth.

And finally, prescription is alleged, because, from the complaint it appears:

First. That the action upon recognition of a natural son is brought after the death of the presum-tive father. Article 137 of the former Civil Code.

Second. Because natural children and grand-children have not the right of representation. Articles 137 of the former Civil Code, and 187 and following of the present Code.

Third. The cases of exception established by Article 137 of the former Civil Code for the investigation of paternity after the death of the presum-tive father, do not happen here.

By virtue of the above reasons, defendant appears and prays the court to sustain these demurrers and that defendant Federico Calaf be declared not required to answer said complaint in the form it has been presented, and that he be absolved from the same.

San Juan, P. R., April 12, 1906.

(Signed) RICARDO LA COSTA,
*Attorney for Defendant.*"

3. Among other documents presented during the trial as evidence for the plaintiffs, there appears the following one which we copy literally:

"Case 213—Rosa Maria Calaf Fugurull—Ex parte Attorney Fernandez—Declaration of intestate heirs—In the city of Ponce, P. R., today, the 19th of July, 1907.

In view of the application of petitioner Rosa Maria Calaf y Fugurull through her attorney, Mr. José Fernandez, and appreciating the evidence presented and hearing the Fiscal, the court is of the opinion that the death of Mr. Ramon Calaf Martinez which hap-
70 pened in this city on the 9th of October 1895, without executing any testamentary disposition, and leaving as his only heirs his seven natural recognized sons, had with Doña Brigida Fugurul, named, Adela, Carmen, Maria Higinia Belen, Gumersinda Dolores, José Valentin, Rosa Maria, and José Miguel Patricio Calaf y Fugurul, have been duly proven; that it has been equally shown that Adela and José Valentin Calaf y Fugurul died intestate, single and without leaving any legitimate descendants; and also the death of Carmen Calaf Fugurul also unmarried, but leaving an illigitimate recognized son named Cesar Velazquez Calaf; that on the 8th of April, 1904, and prior to the death of the above mentioned, Doña Brigida Fugurul also died; consequently the court declares as intestate heirs of Ramon Calaf y Martinez his seven recognized natural children, the above mentioned Adela, Carmen, Maria Higinia Belen, Gumersinda Dolores, José Valentin, Rosa

Maria and José Miguel Patricio Calaf y Fugurul, by seventh parts; and by reason of the posterior death of Adela and José Valentin Calaf y Fugurul, the court declares as their intestate heirs the four surviving brothers and sisters named Maria Higinia Belen, Gumersinda Dolores, Rosa Maria and José Miguel Patricio Calaf y Fugurul, also their nephew Cesar Velazquez Calaf, the son of Carmen Calaf Fugurul deceased, a sister of said ancestor. The said surviving brother and sister inheriting by their own right and the nephew by the right of representation one fifth each, of the estate of the said Adela and José Valentin Calaf y Fugurul; and finally, the court also declares Cesar Velazquez Calaf as the sole intestate heir of his mother, Carmen Calaf y Fugurul, and that the petitioner ought to pay the cost herein, charging it to the estate, which costs amount to $—."

D.

The District Court of Arecibo rendered its judgment sustaining the complaint which originated the present suit, and this Supreme Court, finding to be true the facts marked with Nos. 7, 8, and 9 of paragraph marked with the letter "B" and which constitute the plea of Res Adjudicata, admitted said plea and declined to go into the discussion and decision as to the force of several elements of proof brought to the trial in favor or against the recognition of Juan Ramon Calaf by Salvador Calaf, and, in addition, the court
71 established that although the exception of Res Adjudicata had not been made, it would also result that the fundamental fact of the complaint, that is, the recognition of Juan Ramon Calaf as a natural son, had been already decided finally by a previous decision in a negative sense, and that said decision cannot be contradicted or discussed in the present case; that the action seeking the nullity of the institution of heir of Federico Calaf is improper because as there does not exist a self evident and authentic document showing the recognition of Juan Ramon Calaf by Salvador Calaf, the action seeking the recognition ought to have been brought previously or, at least, simultaneously to the present one; that the evidence presented by plaintiff with reference to the recognition is impertinent because the action brought is not one for filiation and recognition of natural son, but one for the nullity of institution of heir, and in this case no other evidence should have been admitted than that tending to justify that the recognition was established in a solemn and authentic form or by a judgment, and said evidence has not been brought to the trial; and that, lastly, in the case that this suit might be considered as brought to justify the condition of Juan Ramon Calaf as a natural recognized son of Salvador Calaf, then it would be proper to dismiss the complaint because the action had prescribed when the complaint was filed.

In witness whereof and in order that the above statement may appear as a part of the record in said appeal, we the magistrates of the court sign it on the above said date.

(Signed) JOSÉ C. HERNANDEZ.
ADOLPH G. WOLF.
EMILIO DEL TORO.

72 In the Supreme Court of Porto Rico.

No. 471.

ROSA MARÍA, JOSÉ MIGUEL, GUMERSINDA DOLORES, MARÍA HIGINIA Calaf Fugurull, and César Velezquez Calaf, Plaintiffs & Appellants,

vs.

FEDERICO CALAF RIVERA, Defendant & Appellee.

UNITED STATES OF AMERICA,
*The President of the United States, ss:*

[Seal Supreme Court of Porto Rico, United States of America.]

To Federico Calaf y Rivera, Defendant & Appellee, and to Antonio Alvarez Nava, and Jorge V. Dominguez, his Attorneys:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington, D. C. within sixty days from the date of this writ, pursuant to an appeal filed in the office of the Secretary and Reporter of the Supreme Court of Porto Rico, in a certain cause lately pending in said Court, wherein Rosa María, José Miguel, Gumersinda Dolores, María Higinia Calaf Fugurull, and Cesar Velazquez Calaf, are plaintiffs and appellants, and you are defendant and appellee, to show cause, if any there be, why the judgment rendered
73 therein against the said defendants and appellants should not be reversed, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. James H. MacLeary, Associate Justice of the Supreme Court of Porto Rico, at the city of San Juan, P. R., this 8th day of August, in the year of our Lord, one thousand nine hundred and eleven.

J. H. McLEARY,
*Associate Justice of the Supreme Court of Porto Rico.*

Attest:
J. HERNANDEZ USERA,
*Secretary and Reporter of the Supreme Court of Porto Rico.*

[Seal Supreme Court of Porto Rico, United States of America.]

Recibeda capia hoy Agosto 10, 1911.
ALV. NAVA & DOMINGUEZ.

Received this writ this 8th day of Aug. 1911 and served the same by delivering a true copy thereof to the within named Jorge V. Dominguez one of the attorneys of record. This at San Juan this 10th day of Aug. 1911.

S. C. BOTHWELL, *Marshal.*

74 In the Supreme Court of Porto Rico.

No. 498.

ROSA MARÍA, JOSÉ MIGUEL, GUMERSINDA DOLORES, MARÍA HIGINIA Calaf Fugurull and César Velázquez Calaf, Plaintiffs and Appellants,

vs.

FEDERICO CALAF RIVERA, Defendant and Respondent.

On Appeal to the Supreme Court of the United States.

*Clerk's Certificate.*

I, José Hernández Usera, Secretary-Reporter of the Supreme Court of Porto Rico, do hereby certify:

That the foregoing papers and proceedings had in the above entitled case are true and faithful copies of their respective originals as the same appear on file and record in this office, and embodied in this transcript upon the appellants' request; I further certify, that the translation of said papers and proceedings have been made by the Attorneys for the Appellants and the same has been revised, corrected and agreed to by the Attorneys for Appellee.

In testimony whereof, I have hereunto set my hand and affixed the seal of this Court at the City of San Juan, Porto Rico, this 5th day of February, A. D., one thousand nine hundred and twelve.

[Seal Supreme Court of Porto Rico, United States of America.]

J. HERNANDEZ USERA,

*Secretary-Reporter of the Supreme Court.*

(Seven Porto Rico Excise Tax stamps, cancelled.)

Endorsed on cover: File No. 23,072. Porto Rico Supreme Court. Term No. 199. Rosa Maria Calaf y Fugurul et al., appellants, vs. Federico Calaf y Rivera. Filed February 27, 1912. File No. 23,072.

# INDEX.


| Subject. | Pages |
|---|---|
| Statement of the Case | 1 |
| Specification of Errors | 5 |
| Argument | 8 |
| First question. Necessity or non-necessity of special form or requisite under Law 11 of Toro for a father to make a voluntary recognition of his natural son | 8 |
| Second question. Res Adjudicata | 20 |
| Third question. Prescription of Action | 31 |
| Conclusion | 38 |
| List of Cases referred to in this Brief: | |
| Curtis vs. Whitney, 13 Wall. 68 | 36 |
| 91 U. S. 526 | 31 |
| 198 U. S. 418 | 31 |
| 109 U. S. 426 | 31 |
| Decisions of the Supreme Court of Spain dated: 8th Oct., 1853; 16th April, 1864; 26th Jan., 1865; 20th Feb., 1865; 2nd March, 1865; 4th April, 1865; 30th June, 1865; 9th Oct., 1865; 11th June, 1870; 5th Jan., 1871; 23rd Mar., 1872; 10th Jan., 1873; 10th Jan., 1874; 14th Oct., 1875; 27th Dec., 1876; 21st May, 1877; 6th May, 1881; 18th Oct., 1882; | |

PAGE.

16th Nov., 1886; 29th Mar., 1889; 18th Mar., 1890; Oct. 8, 1853; April 11, 1861; 16th April, 1864 ..... 11
16th Sept., 1865; 30th Nov., 1869 ..... 12
11th June, 1870; Jan. 5, 1871, April 20, 1871; Mar. 23, 1872; Mar. 18, 1873 13
Dec. 1, 1881; Jan. 19, 1888; Jan. 20, 1888; Nov. 29, 1899 ..... 14
June 14, 1864; April 8, 1897 ..... 25
April 27, 1888 ..... 32
July 9, 1896; Sept. 23, 1898 ..... 33
April 11, 1906 ..... 34
Dec. 28, 1906 ..... 35
Avilis vs. Sucesini Lanje—Decisiones de Puerto Rico, Castro, Vol. 1, page 350-355 ..... 19
Rivers vs. Borrero—P. R. R. Vol. 3, p. 439 19
Callanon vs. Vatruba—40 L. R. U. 376.... 27
Los Angeles vs. Millus—594 Cal. 444 .... 27
Choel vs. Johnson—74 N. Y. 86 ..... 27
Cambridge V. N. B. vs. Lynch—76 N. Y. 514 27
Gage vs. Eich—56 Ill. 297 ..... 28
Kirchmen vs. Wood—48 Mids. 199 ..... 28
20 Ala. 284 ..... 29
Andrews v. Loveland—1 Colo. 8 ..... 29
Carner v. Harmony Mill—13 Jones & S. 148 ..... 29
6 Abb. N. C. 212 ..... 29
Cummings v. Beard—2 Minn. 34 ..... 29
Ferris v. Aspinwall—10 Abb. Pr. 115 Jones & S. 558 ..... 29
Morags v. Emeris—4 Cal. 309 ..... 29
Olson v. Newton—3 Wash. 429 ..... 29
Slage v. Bodna—58 Ind. 465 ..... 29
Wewell vs. Cathing—Ind. 147 ..... 29
Coy vs. his Creditors—9 Mart. I. S. 519 ... 30

| | Page. |
|---|---|
| Fink v. Martin—5 La. Ann. 103 | 30 |
| 62 Fed. Rep. 694 | 31 |
| 16 C. C. U. 591 | 31 |
| 71 Cal. 183 | 31 |
| 59 Cal. 444 | 31 |
| Section 8—Foraker Act | 38 |
| Law 11 of Toro | 9 |
| Sec. 131—Civil Code of Spain | 17 |
| Sec. 135—Civil Code of Spain | 18 |
| Transitory Provisions, Civil Code of Spain | 18 |
| Sec. 1219—Revised Civil Code | 24 |
| Sec. 1219—Revised Civil Code | 25 |
| Amended Sec. 193 & 194, of the Revised Civil Code of P. R. | 37 |
| Vol. 23, p. 836, 1124 & 1155, Cyc. of Law & Procedure | 27 |
| Vol. 1, p. 17, Sec. 15—Freeman on Judgments | 28 |
| 8 Amer. & Eng. Cyc. of Law, page 24 | 29 |
| 23 Cyc. of Law & Procedure, p. 836 | 30 |
| Vol. 1, p. 485, of Freeman on Judgments | 30 |
| Re Weber—28 L. R. A., 621 | 26 |

IN THE

# Supreme Court of the United States,

OCTOBER TERM.

1913.

| | |
|---|---|
| ROSA MARIA CALAF Y FUGUERUL, et al,<br>Appellants,<br><br>vs.<br><br>FEDERICO CALAF Y RIVERA,<br>Defendants. | Appeal from the Supreme Court of Porto Rico. Number 199. October Term 1913. |

## BRIEF AND ARGUMENT OF APPELLANTS.

### Statement of the Case.

This is an appeal taken against a decision of the Supreme Court of Porto Rico. The appellants filed their complaint in the District Court of Arecibo, Porto Rico, in which they substantially alleged that their ancestor, Juan Ramón Calaf y Martinez, was a son of Salvador Calaf y Serra and Maria Antonia Martinez; that he was born

on the 31st day of August, 1840; that his parents, at the said date and the nine months prior thereto professed the Catholic Apostolic Roman religion, were of more than fourteen years of age, each of them, mentally capacitated, single, of free condition, lay, not tied to each other by any relation nor by reason of any crime, nor engaged, either of them, to any other person in promise of marriage. That the said ancestor of appellants was recognized by Salvador Calaf y Serra as his natural son, having been held and considered his whole life as a natural son recognized by his father, that the father of appellants' ancestor died in Porto Rico, left his testament which was executed some days prior to his death in 1903, and that in the said will he instituted as his only and universal heir another natural recognized son, the appellee herein, ignoring and omitting his natural grand-children, the appellants. That all the property and estate left at his death by the testator was, at the time of bringing this action, in the possession of defendant. The action aimed to obtain from the Court a judgment declaring that said will was null and void and ordering that the intestate succession of Salvador Calaf y Serra be opened. To said complaint a demurrer was interposed on special grounds as appears in pages 4 and 5 of the record, and the District Court of Arecibo, on January 14, 1909, overruled the demurrer, ordering defendants to answer the complaint in five days. The complaint had been filed on October 13, 1908. Defendant, appellee herein, answered the complaint, establishing several defences, as appears in pages 10 and 11 of the record and which in substance were as follows:

The essential facts of the complaint were denied, to wit, that Salvador Calaf y Serra was the father of Juan Ramón Calaf y Martinez, that the latter was never recognized as the natural son by the former; that plaintiff's or appellant's children were not grand-children of Salvador Calaf, that Maria Antonia Martinez was of the negro race and a slave. It was also alleged that at the time of the filing of the complaint there was another action pending in the District Court of San Juan, and that the same plaintiffs had filed a complaint against defendant in the District Court of San Juan in the month of March, 1906, which complaint had been dismissed on demurrer; that the decision was in its full force and strength, and no appeal or other recourse had been taken to review the same. That in the said decision it was declared that Juan Ramón Calaf had not the status of a natural recognized son of Salvador Calaf y Serra, and that the cause of action established by the present complaint was the same which was established and decided in the said case before the District Court of San Juan.

This case was tried on April 21, 22, 23, 24, 26, and 27, 1909, and the Court rendered its judgment on the 30th of July, 1909, after hearing the evidence presented by both parties, and after considering in general said evidence and the allegations of law, declaring that clause 8 of the testament of Salvador Calaf y Serra, executed on March 24, 1902, by which appellee herein was instituted his only heir, is null and avoid and has no legal value whatever, and that defendant shall pay the costs of litigation.

Some of the appellants herein, but not all of them, had filed in the District Court of San Juan,

on March 14, 1906, a complaint in which it was substantially alleged that they were the descendants and heirs of Ramón Calaf, who had always enjoyed the status and condition of a natural son of Salvador Calaf, but that he was not recognized as his natural son in a public instrument or in his testament, as defendant, Federico Calaf, had been; that all the properties of the estate of Salvador Calaf were in the hands of defendant; that plaintiffs had been unable to find, until two months prior to the filing of the complaint the necessary proofs to bring their action, for which reason they had been under the impossibility of exercising their rights up to the said time; and prayed the Court, among other things that a declaration be made by the Court to the effect that Ramón Calaf was a natural son of Salvador Calaf.

To this complaint a demurrer was interposed on several grounds. The complaint, and the demurrer are in the transcript of record at pages 37, 38, 39, 40, 41, 42, and 43. The decision of the Court sustaining the demurrer is inserted at page 24.

An appeal was taken to the Supreme Court of Porto Rico from the judgment rendered in favor of plaintiffs, appellants herein, by the District Court of Arecibo, which is inserted on page 12 of the record; and the Supreme Court, on February 14, 1911, rendered its decision (page 28 of the record) repealing the judgment of the District Court of Arecibo and dismissing the complaint. The reasons for the decision were stated in the opinion of the Chief Justice, which is inserted in pages 13 to 27 of the record.

## Specification of errors.

There are three different questions, to be treated separately in this case:

THE FIRST QUESTION RELATES TO THE NECESSITY OR NON-NECESSITY OF A SPECIAL FORM OR REQUISITE, UNDER LAW 11 OF TORO, FOR A FATHER TO MAKE THE VOLUNTARY RECOGNITION OF A NATURAL SON.

This question involves the following errors, which appellants allege were committed by the Supreme Court of Porto Rico, to wit:

In deciding in favor of defendant-appellee and against the appellants, in that it failed to apply the law 11 of Toro, which was in force at the time of the birth and life of the ancestor of appellants, under which the claim in this cause is urged, with reference to the recognition of natural children.

In deciding that a recognition made by a father over his signature in a private document, when such recognition has been corroborated by reasonable proof, and the constant use of the paternal surname, is not sufficient to constitute a legal recognition according to the Law 11 of Toro.

In determining that a private document in which a recognition of a child is made is not an authentic and solemn evidence of such recognition, and that the same has not that degree of solemnity which the law requires in that behalf.

In deciding and holding in this action, in which the nullity of a will and the enforcement of hereditary rights are asked by parties who base their claim on the recognition of a natural son made by a testator in a private document corroborated by proofs of its authenticity or genuineness, and the

uninterrupted use of the paternal surname, and which recognition was made in accordance with and under the regime of the law 11 of Toro, that no other evidence should have been admitted by the Court at the trial than such as would demonstrate that such recognition appeared in an authentic or solemn form or in a judicial decision, and that without such evidence plaintiffs appellants could not recover judgment in such action.

In deciding that the declarations of witnesses tending to prove acts of recognition as a natural son of Juan Ramón Calaf by Salvador Calaf, that the private document signed by the latter, the certificate of the inscription of the former in the book of confirmations of the Church, the declarations of witnesses tending to demonstrate the authenticity of such private document and the evidence of experts with reference to said document, can only be used as evidence in a suit for filiation and recognition, but that the same cannot be used in an action based on the assumption that such recognition and filiation actually existed, and in which action hereditary rights under such recognition are demanded.

In deciding that in this case a judicial recognition by a court was required as a basis for that action notwithstanding that a voluntary recognition was proven as the basis therefor.

The Court also erred in failing to hold that the certificate of confirmation offered as evidence of recognition was not sufficient to establish the status of natural recognized children.

THE SECOND QUESTION IS IN REGARD TO THE PLEA OF RES ADJUDICATA.

It involves several errors assigned by appellants, to wit:

The Court erred in deciding that the judgment or decision urged as matter of *res adjudicata* was presumed to have been registered by the Clerk of the Court.

Also erred in deciding that the sustaining of a demurrer to a complaint under the circumstances disclosed by the record herein, constitute a legal basis for the plea of *res adjudicata.*

Also in deciding that in this action and the action pleaded by defendant as *res adjudicata* hereof, that there was such identity of cause of action or of parties as would justify sustaining such plea of *res adjudicata.*

Also erred in holding that the said plea of *res adjudicata* interposed by the defendant in this cause was valid and efficacious for the reason that as disclosed by said plea, the nature and character of the action which was the basis of the said plea, was entirely different from that urged herein.

THE THIRD QUESTION REFERS TO THE MATTER OF PRESCRIPTION OF THE ACTION SEEKING RECOGNITION.

It involves other errors, which are assigned as follows:

There was error in deciding that in the institution of an action seeking the nullity of the will of the actual father of their ancestor appellants have deprived appellee of the right to urge the plea of prescription in a case in which a valid recognition voluntarily made by the father existed.

The Court also erred in deciding that the action of filiation in this controversy had prescribed because such action has never been instituted and the basis of plaintiff's claim for relief was upon a recognition voluntarily made by the father in due accordance with the laws in existence at the time of such case of recognition.

In holding and deciding that a necessity exists for the institution of an action to establish filiation in cases where the father has voluntarily recognized a child, although such recognition should not be made to appear in a public deed or instrument.

## ARGUMENT.

### First Question. Necessity or non-necessity of special form or requisite under Law 11 of Toro for a father to make a voluntary recognition of his natural son.

At the outset it becomes important to establish the following proposition, which has not been controverted herein: That the rights of a natural recognized son, who was born prior to the adoption of the Spanish Civil Code in Porto Rico, in 1889, are regulated and controlled by the law 11 of Toro. This proposition has been stated as a general rule by the Supreme Court of Porto Rico, thus continuing the jurisprudence settled by the Supreme Court of Spain. In the opinion of the Court in this case, page 20 of the record, it is said:

> "It cannot be admitted that in accordance with the law 11 of Toro under the regime of

which Juan Ramón Calaf was conceived and born,——

*Law 11 of Toro.* There were eighty-three laws prepared during the reign of Ferdinand and Isabella in the Cortes of Toledo, in 1502. Said laws could not be published until 1505, when the Cortes held in the City of Toro, on the occasion of taking the oath of fidelity to Queen Doña Juana, a daughter of Ferdinand and Isabella, and of the appointment of Ferdinand as regent, promulgated them. Said laws treated of several matters which had been prior to 1502 the object of great discussions about the interpretation of the former legal bodies. Law number eleven, which is law first, Title fifth of Book Tenth of the collection known as Novisima Recopilación, is as follows, in Spanish:

"Porque no se pueda dudar cuales son hijos naturales, ordenamos y mandamos que entonces se digan ser los hijos naturales, cuando al tiempo que nacieren, o fueren concebidos, sus padres podian casar con sus madres justamente sin dispensación, con tanto que el padre lo reconozca por su hijo, puesto que no haya tenido la mujer de quien lo hubo en su casa ni sea una sola; concurriendo en el hijo las qualidades susodichas, mandamos que sea hijo natural.

Translation:

So that it cannot be doubted who are natural children we do ordain and decree that hereafter be called natural children those, who, at the time of their birth or their conception, their father might marry their mother justly without dispensation, provided that the father may recognize him as his child, as the woman from who he had the son had not been kept in his house, and be not the

only one; those conditions as above stated concurring in the son, we decree that he be a natural one.

The Supreme Court of Porto Rico, without any ground or foundation, breaking with all the jurisprudence priorly established by the Supreme Court of Spain, and without sufficient explanation justifying the change has established in this case the wrong and arbitrary doctrine that under the law 11 of Toro, it is required, in order to exercise the rights of a natural recognized son, that the fact of the recognition by the natural father be proved in a manner which be solemn, self-evident, and authentic. We assume that our Supreme Court requires that the only proof admissible in an action of this kind be a public instrument; that is, a declaration made before a notary public in the presence of witnesses, with all the formalities provided in the notarial regulations. The error of our Supreme Court is evident, and we beg to call the attention of the Court to the language of the Law 11 of Toro, above quoted, and the considerable number of statements and declarations made by the Supreme Court of Spain construing said law.

The Supreme Court of Spain has repeatedly said:

> "In accordance with the law 1st title fifth, book X of the Novisima Recopilación, (Law 11 of Toro) in order that a child may be reputed as natural, it is sufficient that his parents, at the time of the conception or the birth, might marry, justly, without dispensation, provided that the father recognize him as his own; it is not necessary that this recognition be express, it being sufficient a tacit one,

provided that it be proven by any of the means allowed by law, according to the jurisprudence established by the Supreme Court."

The preceding doctrine has been laid down in the following decision of said Court:

| | | | |
|---|---|---|---|
| 8 October | 1853 | 23 March | 1872 |
| 16 April | 1864 | 10 January | 1873 |
| 26 January | 1865 | 10 January | 1874 |
| 20 February | 1865 | 14 October | 1875 |
| 2 March | 1865 | 27 December | 1876 |
| 4 April | 1865 | 21 May | 1877 |
| 30 June | 1865 | 6 May | 1881 |
| 9 October | 1865 | 18 October | 1882 |
| 11 June | 1870 | 16 November | 1886 |
| 5 January | 1871 | 29 March | 1889 |

18 March 1890

In a decision rendered October 8, 1853, which is in the Legislative Collection for the year 1853, No. 6, it was said as follows:

> "The law 11 of Toro does not require that the recognition of a natural son by the father be express, nor was there any other law prior thereto which so required."

In the decision of April 11, 1861, published in Leg. Coll. 1861, p. 293, it was said:

> "It is not necessary, in order to justify the quality of natural son, in procedings regarding provisional alimony, that the recognition by the father should appear in a public deed or testament, nor in an executory judgment, there being sufficient supplementary proofs."

In the decision of April 16, 1864, (Leg. Coll. 1864, Vol. I p. 352) it was declared:

"The quality of natural son is to be necessarily founded on the spontaneous recognition of the father, legally proved, or, in case of omission or resistance, on a solemn judgment in which it be so declared."

In the decision of January 26, 1865, Leg. Coll., Vol. I p. 993, the following statement was made by the Court, which is utterly in contradiction to the doctrine laid down in this case by our Supreme Court:

"Law 11 of Toro, that is, Law 1, title 5, book 10, of the Novisima Recopilacion, only requires that the father may recognize his natural son, without distinguishing the express from the tacit recognition, nor prescribing any especial manner to prove the same."

In the decision of March 2, 1865, Leg. Coll. 1865, Vol. I, page 302, it was said that: "in order that such recognition may be reputed as legal it is sufficient that it may be shown by means of any of the proofs allowed by the law, as has been declared by the Supreme Court of Justice, and the evidence considered sufficient by the Court rendering judgment." This doctrine has been repeated in the decisions dated, June 30, 1865, Leg. Coll. 1865 v. 1, p. 1158 and Oct. 9, 1865, Leg. Coll. 1865 v. 2 p. 173.

In the decision of Sept. 16, 1865, Leg. Coll. 1865 v. 2, p. 50, it was said:

"In order that it be declared that a person is the natural child of another, it is necessary that it clearly appears that the latter recognized the former as such, either in a tacit or express manner."

In the decision of Nov. 30, 1869, Leg. Coll. 1869, v. 2, p. 518, was said:

> "It pertains to the Court rendering the judgment to appreciate, in using its powers, the result of the evidence presented upon questions of facts, as that of the declaration of a natural child, and such appreciation should prevail unless it be alleged against it that some infraction of law or doctrine admitted by the jurisprudence of the Court has been committed."

Again, in the decision of June 11, 1870, Leg. Coll. of 1870, v. 1, p. 929, it was repeated that:

> "It is not necessary that the recognition be express, it being sufficient that it may be proven by any manner established by the law, as has been declared by the Supreme Court in repeated judgments. And, that being a question of fact, the appreciation of the proof presented by the parties to the trial Court should prevail unless it be alleged that in reaching its conclusion it committed any infraction of law or legal doctrine."

The same was repeated in the decisions of: Jan. 5, 1871, Leg. Coll. 1871, v. 1, p. 7; Apr. 20, 1871, Leg. Coll. 1871, v. 1, p. 582; Mar. 23, 1872, Leg. Coll. 1872, v. 1, p. 481, and Mar. 18, 1873, Leg. Coll. 1873, v. 1, p. 377, in which it was said that:

> "It is not contrary to Law 11 of Toro a judgment in which it is declared that the quality of natural son in favor of one who, according to the appreciation of the evidence by the Trial Court has proved by legal means that the father has recognized him tacitly, inasmuch as such law does not require that the recognition be express, as repeatedly has been declared by the Supreme Court."

See also decisions of: Jan. 10, 1874, Leg. Coll. 1874, v. 1, p. 60; Oct. 14, 1875, Leg. Coll. 1875, v.

2, p. 318; Dec. 27, 1876, Leg. Coll. 1876, v. 2, p. 783.

And in the decision rendered on Dec. 1, 1881, Leg. Coll. *v.* 3 p. 868 it was said by the Supreme Court:—

> "That there can be no legal doctrine against the strict terminant provisions of the said law" (referring to the law of Toro).

The Supreme Court has not changed its view on this matter since the adoption of the Civil Code in Spain in 1885, which was extended to Porto Rico in 1889, as is shown by the decisions of:—

Jan. 19, 1888,
Jan. 20, 1888,
Nov. 29, 1899.

Again, in the decision rendered on April 2, 1909, in a case of two natural daughters born in 1854 and 1857, the Supreme Court said as follows:—

> "It is not necessary in accordance with the law II of Toro, that the father recognized the child expressly, in order that the child may enjoy the legal consideration of natural child, but that it is sufficient a tacit recognition according to the jurisprudence established by the Supreme Court with reference to the said law, provided that such recognition has been proven by any of the means admitted in the law."

The action of these appellants is one to exercise and enforce their rights as legal representatives of a natural son, recognized by his father in accordance with the law in force at the time

of his birth. They appeared before the Court armed with the fact of the recognition. They were not trying to secure a recognition from the Court, because they had already the recognition made spontaneously by the father of their ancestor. And so armed, alleging to be in the possession of a right, stating in what manner their ancestor was recognized, they tried to enforce such right against the person who refused to accept it. The defendant denied the fact of the recognition, thus creating an issue of the most essential fact, without which the action could not be successful. The claimants were entitled to prove the fact of the recognition, how it was made, using all of the proofs and evidence at their disposal. They presented a document written by Salvador Calaf reading as follows:—

"I recognize as my natural son Juan Ramón Valentin and this shall be disposed as in the day in which he was baptized (signed Salvador Calaf.)" They also presented a certificate of the recording of the administration of the Sacrament of Confirmation to Juan Ramón Calaf, made in these terms:

> "518, Ramón, h. n, (n. s.) of Salvador Calaf and Maria Antonia Martinez-P. Pedro Elias."

They proved that the initials h. n. were used to designate the condition of natural son (hijo natural). They proved with the declarations of witnesses and caligraphic experts the authenticity of both documents, the continuous use of the surname Calaf, and the acts of Salvador Calaf which demonstrate that he considered always

Ramón as his son. All these proofs would be "pertinent," says the learned judge in the opinion (page 20) in a suit upon filiation and recognition of Juan Ramon Calaf, but the same are not such in a case in which filiation and recognition are supposed to appear in an authentic and self-evident manner, and which, being incontrovertible, to a certain extent, are out of discussion."

We respectfully submit that there is no law, nor principle of jurisprudence, prior to the enactment of the Civil Code, which required declaration of recognition of natural children to be made in any special manner.

Of course, any document which is not written or signed by the very person who appears signing it is not authentic, but it will be so, if it was actually written by that person. Plaintiffs assumed that the private document in which the recognition of their ancestor was made, was written and signed by the latter's father. They assumed that it was authentic, and therefore, that it was self-evident. Such fact was denied, and, at the trial they proved to satisfaction of the Court, that their assumption was correct. The document from that moment should be considered, unquestionably, as authentic and self-evident, and out of discussion, inasmuch as it was so declared by the Court, who had to decide that issue of fact. No error or infraction of law or principle of jurisprudence is alleged to have been committed by the Court, except that the evidence was not pertinent in an action of this kind. What is the class of documents which, in the opinion of the learned Court might properly be classified as

authentic, solemn, self-evident and out of discussion, in a case in which there was no necessity of obtaining the recognition by an appeal to the Courts, but in which the recognition was willingly made by the father in accordance with the laws in force at the time? We cannot conceive that such class of documents may exist, as even the "public documents" that is, those made in the presence of a notary, in which a number of witnesses is necessary, oftenly are doubted, and discussed, and even anulled as fraudulent by the Courts. There was no law since the time of the birth of Juan Ramón Calaf, in 1840, up to 1885, in Spain, and 1889 in Porto Rico, the dates of the promulgation of the Civil Code, requiring any especial manner or form or requisite, for the recognition of natural children. The law II of Toro regulated such recognitions, and provided as has been shown, that, the same might be made in any manner, express or tacit. It was not until the application to Porto Rico of the Spanish Civil Code, that a special form for recognition was required. That was provided in Sec. 131 of the said Code, which reads as follows:—

> Sec. 131.—The acknowledgment of natural child shall be made in the record of birth, by will, or by any other public instrument."

We contend that these provisions are only applicable to voluntary recognitions made since the promulgation of the Code. Said provisions could not have a retroactive effect, and therefore, could not control voluntary recognitions, which were made prior to the promulgation of the Code, as that of Juan Ramón Calaf, by his father Salvador.

The same Code provided also the requisites to be fulfilled in cases in which there is no voluntary recognition or acknowledgment made and the child is compelled to apply to the Courts to obtain it. Those requisites are described in Sec. 135 of the Code, which reads as follows:

> Sec. 135.—The father is obliged to acknowledge the natural child in the following cases:
>
> 1.—When an indisputable paper written by him, expressly acknowledging his paternity, is in existence.
>
> 2.—When the child is in uninterrupted enjoyment of the status of a natural child of the defendant father justified by direct acts of the said father or of his family.

These provisions refer to acknowledgments or recognitions made against the will of the father, by a Court of Justice, and the action to obtain the same is quite different from the actions which the appellants brought against appellee in the District Court of Arecibo. The appellants were not trying to obtain, from the Court a declaration which the father of their ancestor had refused. They alleged the recognition, made voluntarily, and its form could not, under any principle of justice, be controlled, by the provisions of a law promulgated near fifty years after such a willing or spontaneous recognition had been made, in accordance with the legislation in force at that time, which created rights which could not be deprived nor impaired by a new law. See the transitory provisions of the Civil Code:

> "Changes introduced in this code prejudicing rights acquired according to prior legislation shall not have retroactive effect * * *

> Rights arising under the legislation prior to this code, out of matters carried out under its rules, shall be governed by said prior legislation, even if the code should regulate them in another manner, or does not recognize the same * * *"

Before leaving this part of our argument, we desire to state that the Supreme Court of Porto Rico, in October 27, 1902, when the Civil Code had been revised by the Legislative Assembly of the Island, the Court had then the same opinion on this question of requisites for voluntary recognition as the Supreme Court of Spain, which has been quoted above: In the case of Aviles *vs.* Sucesion Lange, published in Volume I of Decisiones de Puerto Rico, Castro, from page 350 to 335, it was said by the late Chief Justice Quiñones, at page 54, as follows:

> "While it is true that the recognition of natural children usually is made in public documents, in multitude of cases the parents fail to fulfil that duty in any express form, and under such circumstances it would be unjust to deprive the chilldren of their right to claim their paternity, for which motive the jurisprudence prior to the Civil Code had established that the recognition by the father required by the law 11 of Toro, in order that the son might be held as natural, was not necessary to be express, it being sufficient a tacit one, provided that it be proven by any of the manners of proving facts permitted by law."

In Rivera vs. Borrero,

> No. 42, March 7, 1903.
> P. R. R. Vol. 3, Pag. 439.

The recognition of natural (illegitimate) children born before the publication of the Civil Code must be governed by the previous legislation and not by article 131 of the Civil Code.

## SECOND QUESTION.

### Res Adjudicata.

The Supreme Court of Porto Rico said in paragraph D of the "Statement of facts in the nature of a special verdict", inserted on page 44 of the record:

> "Although the exception of res adjudicata had not been made it would also result that the fundamental fact of the complaint, to wit, the recognition of Juan Ramón Calaf as natural son, had been already decided finally by a previous decision in a negative sense, and that said decision cannot be contradicted or discussed in the present case."

(1) Our position on this point may be condensed as follows:

> 1.—That the opinion or decision of the District Court of San Juan, which as it is claimed, constitutes res adjudicata, was not a judgment duly entered and should not be considered as sufficient and efficacious to have the pretended effect of constituting res adjudicata.
>
> 2.—That, even admitting that said opinion had the effects of a duly registered judgment, such judgment cannot have any value of effect against the Complaint in the District Court of Arecibo, because it contains a statement of facts which is wholly different from the statement of facts made in the complaint

brought before the District Court of San Juan. We will discuss the last proposition first.

The error of the Supreme Court in reaching such conclusion is evident. A comparison between the two complaints will show it. The fundamental fact of the first complaint is not the recognition of Juan Ramón Calaf, as a natural son, by Salvador Calaf. The fundamental fact was that Juan Ramón was a son, a natural son, of Salvador Calaf, not recognized by him. Other facts tending to show the paternity of Salvador Calaf are alleged also, as well as the fact that Salvador Calaf died in 1903 without having made in a public instrument or in his testament the recognition as his natural son of Ramón Calaf. And, in addition thereto, that the defendant, Federico Calaf Rivera, who had knowledge of the fact that Ramón was the natural son of his father, nevertheless had refused to make a recognition in a public and efficacious manner. In other words, the tendency of that complaint was to obtain from the Courts a declaration which plaintiffs thought that they needed, because of the fact that they lacked a willing declaration by Salvador Calaf. Said action was one looking for recognition, an action in which they had to prove the paternity of Salvador Calaf, so that the recognition might be made by the Court. In the present action the theory is absolutely different, it was now alleged that there was a voluntary recognition by Salvador Calaf of Juan Ramón as his natural son. It is stated the time when such recognition was made; it is not asked from the Court that such recognition be made. The plaintiffs were in this new action required to prove, *not* that Juan Ramón was

the son not willingly recognized, of Salvador Calaf, as in the first action, but the fundamental fact that Salvador had willingly recognized Juan Ramón. The first was an action establishing filiation, and looking for a declaration by the Court which plaintiffs' ancestor had not obtain willingly; the second is an action in which they appear before the Court clad in their right conferred by a declaration willingly made. They no more required or need the declaration by the Court, because they had one, willingly made.

Such distinction has been admitted by the learned judge who wrote the opinion of the Court below, in the discussion of the grounds of demurrer against the new complaint, that there was misjoinder of causes of action; "that is, the action of filiation and the action of nullity of institution of heir, because the mere reading of the prayer of the Complaint shows that the second of the said actions has been the one exercised herein" . . .

> "If the action seeking the nullity has been the only one brought, it is clear that there is no misjoinder of causes of action, which would not exist even if the cause of filiation had been exercised as a basis for the action seeking the nullity of the institution of heir" . . . . "We have carefully read (p. 17 of the Record) the paragraph of the complaint relating to the recognition, which paragraph we have inserted herein before as the third of the fundamental facts of the complaint, and we think that recognition as alleged is enough to constitute with the other facts stated in the complaint the cause of action brought. That action is for the nullity of the institution of heir in favor of defendant, because plaintiffs' grand-children of Salvador Calaf, the father of the father, were ignored, and the allegation that Salvador Calaf

> recognized Juan Ramón Calaf, as his natural son in the days when the latter received the sacraments of baptism and confirmation, and that said Salvador Calaf held and considered Juan Ramón Calaf during his life as such, shows that Juan Ramón Calaf is a natural recognized son of Salvador Calaf, and such recognition, attending to the terms in which it is alleged, should be presumed as made in an authentic manner, because in usual and current language, a recognized natural son is one who has been recognized in that manner; . . . . "On the other hand having in consideration that an action seeking recognition has not been brought, because the recognition is taken for granted, but an action seeking nullity of the institution of heir in favor of Federico Calaf, and such action is precisely based on the existence of such recognition, we are of the opinion that the allegation of recognition in the form in which it has been made is enough for the pretended ends without prejudice to the results of the evidence which be presented at the trial, upon the form in which the recognition is made. If the action brought had been that seeking the recognition perhaps our opinion would be a different one."

We cannot understand how, in view of the above language of the learned judge who wrote the opinion of the Court, from which it clearly appears the difference between the two actions, it has been possible to reach the conclusion that the two actions are similar, and that the dicision rendered by the district Judge of San Juan on a demurrer to the first complaint constitutes *res adjudicata*, and bars a new complaint.

The question of *res adjudicata* in Porto Rico is and must be controlled by the provisions of

Sec. 1219 of the Civil Code, which reads as follows:

> "Presumptions established by law may be destroyed by proof to the contrary, except in the case in which it is expressly prohibited."

"Only a judgment obtained in a suit for revision shall be effective against the presumption of the truth of the *res adjudicata.*

"In order that the presumption of the res adjudicata may be valid in another suit, it is necessary that between the case decided by the sentence and that in which the same is invokd, there be the most perfect identity between the things, causes, and persons of the litigiants and their capacity as such.

"In questions relating to the civil status of persons and in those regarding the validity or nullity of testamentary provisions the presumption of the res adjudicata shall be valid against third persons, even if they shall not have litigated." These sections of the Code correspond exactly to sections 1251, 1252 of the former Civil Code, which was in force since 1889 up to 1902 in Porto Rico.

The record shows that there was no final judgment in the case brought in the San Juan Court. A judgment was never petitioned by any of the parties. No appeal could have been taken while there was no such judgment. An opinion is not a judgment. A case cannot be considered as terminated until it has been finally decided on appeal, or until the time to take an appeal has expired. See Sec. 348 of the Code of Civil Procedure. No appeal can be taken from an opinion, according to the decision of the Supreme Court of

Porto Rico, of May 12, 1905. Therefore it evidently appears that the certified copy of such a decision or opinion which was introduced at the trial by defendant, is insufficient to base a plea of res adjudicata, because from it does not appear that the case had been terminated, which condition is essential in order to produce the effects of res adjudicata.

Under the jurisprudence on this matter which had been given by the Supreme Court of Spain prior to the change of sovereignty in Porto Rico, upon the requisites of judgments to have the effects of res adjudicata, we may quote the decision of June 14, 1864, and May 6, 1868, in which it was declared:

> "That such judgments, while final within the case in which they are rendered, are not firm nor executory, nor do they produce the exception of res adjudicata when rendered in possessory actions and actions for interdicts and in all other cases which do not exclude the prosecution of others upon the same object, although by different motive."

In the decision of April 8, 1897, it was said:

> "Those decisions of mere substantiation have not the effect of res adjudicata."

The Civil Code, in the Section above quoted requires that:

> "In order that the presumption of the res adjudicata may be valid, in another suit, it is necessary that between the case decided by the sentence and that in which the same is invoked there be the most perfect identity between things, causes, and persons."

In commenting upon these terms, and particularly upon the identity of causes, the decision of the Supreme Court of Spain of September 28, 1897, declares:

> "It is the constant doctrine when a suit is terminated by an executory judgment and there is litigation upon the same thing, but for different reason or cause of petition, that there is no disregard to the res adjudicata in deciding the second suit against the litigants who gained the first one."

In the case of R. E. Weber, 28, L. R. A. 621, is is said:

> "Under the statute of this state (N. Dak.) relating to the entry of judgments in District Courts, a final judgment does come and has no force, until entered by the Clerk in the Judgment-Book.
>
> 2.—An order of the District Court dismissing an action for jurisdictional reasons, as well as in other cases, will authorize the clerk of the District Court to enter judgment, but such order does not thus constitute a judgment, nor is it a final determination of any question.
>
> 3.—An order of dismissal, whether in the minutes of the court or entered in the Book labelled "Order-Book" or written out signed by the Judge and filed, is still an order and does not constitute a final determination or final judgment.
>
> 4.—Until judgment is entered upon the order, that action is not terminated, but is pending in the District Court."

In the same case there are several notes at the foot, in which it is said:

> "The general rule is that a mere decision or direction is not a judgment and admissible in evidence as such."

On page 637 of the same, Vol. 28, in note 12, of the same case, we find the following:

> "The entry of judgment is usually deemed necessary to make it effective as a bar to another action for the same cause."

In support of this doctrine numerous cases are cited in the same page.

In this case of Callanon vs. Votruba, 40 L. R. A. 376, there is also a confirmation of the above theory.

In Vol. 23, p. 836, of the Cyclopedia of Law of Procedure it is said:

> "As between the parties a judgment duly rendered is valid and effective although not entered; that is, the neglect or failure of the Clerk to make a proper entry of the judgment, or his defective or inaccurate entry of it will not deprive it of the force of a judicial decision; still a judgment is not complete and perfect for all purposes until it has been duly entered. Thus until entered, it cannot create a lien upon the land of the debtor such as to affect third parties, or support a claim of res adjudicata or former adjudication."

In Vol. 23 of the same work (Cyc. of Law of Procedure) at Page 1124 we find:

> ".....but the decision or finding of the court does not constitute a bar to a subsequent action unless followed by a judgment thereon."

On page 1155 of the same Vol. we find:

> "A judgment sustaining a demurrer to a complaint on the ground that it does not state facts sufficient to constitute a cause of action is an adjudication upon the merits so far as complaint goes, and may be pleaded in bar of another suit on the same facts, but such decision will not bar a subsequent suit on a new complaint, supplying the omissions to which objections were taken by the demurrer or setting up new or different facts."

In the case Los Angeles *vs.* Millus, 59 California 444, the Court said:

> "A judgment on demurrer to the complaint leaves the plaintiff at liberty to present his complaint in another action so amended in form or in substance as to be no longer vulnerable to attack made in the former suit; and such a judgment can never be pleaded in bar to a good complaint for the same cause of action."

We quote from Vol. 1, p. 17, Sec. 15 of Freeman on Judgments:

> "There is no dissent from the proposition that the sustaining or overrulling of a demurrer, unless followed by the entry of final judgment disposing of the action or proceeding, is not a judgment within the meaning of the statutes permitting appeals from judgments."

The same doctrine is supported by

> Choell vs. Johnson, 74 N. Y. 80;
> Cambridge V. N. B. vs. Lynch, 76 N. Y. 514;
> Rose vs. Gibson, 71 Ala. 35;
> Kirchmen vs. Wood, 48 Mich. 199;
> Gage vs. Eich, 56 Ill. 297.

In 20 Ala. 284, it is said:

> "A decision of the Court signed by the Judge and filed among the papers of the case is not a judgment of the Court and admissible in evidence as such until entered on record, though endorsed as a decree in the proceedings."

An order sustaining or overrulling a demurrer is a mere order for judgment, and before an appeal can be taken therefrom, judgment must be entered on it:

Carner *v.* Harmony Mill, 13 Jones & S. 148;
6 Abb., N. C. 212;
Ferris *v.* Aspinwall, 10 Abb. Pr. 115 Jones & S. 558;
Olson *v.* Newton, 3 Wash. 429;
Morago *v.* Emerio, 4 Cal. 309;
Cummings *v.* Heard, 2 Minn. 34.

The decision sustaining a demurrer without any further action of the Court is not a final judgment.

Slage *v.* Bodna, 58 Ind. 465;
Wewell *v.* Cathing, Ind., 147;
Andrews *v.* Loveland, 1 Colo. 8.

> "The sustaining or overruling of a demurrer, though it be directed to the very elements of the cause of action or to the defense is not final; in the former case, the judgment of dismissal, and in the latter, the judgment for the amount sought to be recovered, is yet to be entered."

8 Amer. & Eng. Cyc. of Law, p. 24.

In Vol. 23, Cyc. of Law of Procedure, p. 836, it is said:

> "Rendition and Entry of Judgment: That the fact, that the plaintiff's demurrer to the defendant's pleading may be sustained and the action thus left on defendant, may entitle the plaintiff to judgment, the latter of course is not in existence until its rendition and entering."

In Freeman "On Judgments," Vol. 1, p. 485, is said:

> "The decisions are very numerous and establish almost beyond controversy that the judgment sustained in a demurrer to a demurrable complaint cannot be successfully pleaded in bar to a subsequent action in which the complaint is perfect, though the plaintiff might, had he chosen to do so, have made the same allegations in the first action as in the second."

In Coy *v.* his Creditors, 9 Mart. O. S. 519 and Fink *v.* Martin, 5 La. Ann. 103, it is said:

> "Pleas like *res adjudicata*, precluding an examination of the merits, cannot be aided by inference, but must be established beyond all question. The legal presumption attached to such an estoppel is of too great a character to be recognized as resulting from any litigation in which its essential characteristics are not free from all doubt."

It is equally well settled that if the plaintiff files any demurrer in the first action from the omission of essential allegations in his declaration which is fully supplied in the second suit, the judgment in the first suit is no bar to the complaint, although the respective actions were insti-

tuted to enforce the same right; for the reason that the merits of the cause as disclosed in the second declaration were not heard and decided in the first action.

24 Amer. & Eng. Encyc. of Law, 800;
Citing among many others the following:
91 U. S. 526;
198 U. S. 418;
109 U. S. 426;
62 Fed. Rep. 694;
10 C. C. A., 591;
71 Cal. 183;
59 Cal. 444.

## Prescription of Action.

The Supreme Court of Porto Rico, in paragraph D of the Statement of Facts, in the nature of a special verdict, says as follows:

> "In case that this suit may be considered as brought to justify the condition of Juan Ramón Calaf as a natural recognized son, of Salvador Calaf, then it would be proper to dismiss the complaint, because the action had prescribed when the complaint was filed."

We have assumed from the beginning that this case is not one brought to justify the filiation of Juan Ramón Calaf and to obtain a declaration that he was a natural son of Salvador Calaf. This has been understood by the learned Judge who wrote the opinion of the Court below, when he said in page 16 of the record:

> "The question debated herein is that of the nullity of the institution of heir . . . that

> there was no misjoinder of causes of action, other than the action of filiation and the action of nullity and institution of heir, because the mere reading of the prayer of the complaint shows that the second of such actions has been the one exercised herein." See also paragraph D of Statement of Facts, page 44.

But as the Court suggests the possibility that this action may be considered as brought to justify the condition of Juan Ramón Calaf, as a natural recognized son of Salvador Calaf, and in such a case the Court decided that it would be proper to dismiss the complaint because the action had prescribed when the complaint was filed, for said reason we deemed it necessary to discuss the question in connection with the prescription of the action brought.

Our position might be condensed as follows:—

> The plea of prescription cannot be invoked in the matter of recognition of natural children who were born under the regime of law 11 of Toro. Also, that natural children, under the legislation prior to the Civil Code, do not need to exercise the action of filiation, and to obtain, through it, a judicial recognition, previously or simultaneously to bringing their action for the purpose of enforcing the rights which they have as such natural children, provided that they have been recognized in accordance with the law 11 of Toro.

The Supreme Court of Spain, in its decision of April 27, 1888, said:—

> "The question of filiation has been debated in the case and it is not enough to say, to the contrary, that plaintiff did not pray to the previous declaration that J. is a natural son of S. because this cardinal fact constituted

the base of the claim and reason or fundament of the action."

In the judgment of the Supreme Court of Spain of July 9, 1896, it is settled, as a general and absolute principle that:—

> The rights and actions recognized in former legislation to natural children should continue to subsist in all their extent and effect in accordance with rule 4 of the Transitory Provisions of the Civil Code; and said principle was established in order to consider that the provisions of articles 131, 133 and 134 of the Civil Code of Spain were not applicable to the cases of filiation of persons born before the said code went into effect.

It is said in said decision as follows:—

> "Considering that the actions and rights originated prior to the publication of the Code, according to Rule 4 of the Transitory Rules, should subsist in all its extension; and in the terms recognized by the prior legislation, it is evident that the right of the minors E. and N. A., to be recognized as natural children of M. H. is conditioned not by articles 131, 133, and 134 of the Code, but by the Law 11 of Toro, because the date of the birth of the said minors is prior to the date in which the said Code went into effect." etc.

In the decision rendered on Sept. 23, 1898, the same theory is reasserted for the reason that the recognition of the natural son affects the very existence of the right, as it is the act which determines and concludes it; and that the provisions of section 135 of the Code are not applicable within Rule 4 Transitory; which gives retroactive effect to the provisions of the said Code with

reference to the exercise and duration and the rights and proceedings to enforce them. In said decision it is stated as follows:—

> "Considering that as against the allegations of appellant, it is certain that said law is applicable to the son who invokes it in his favor, because his right was born under its regime, inasmuch as the 4th Transitory Provision of the Civil Code gives only retroactive effect to the provisions of the said Code, which refer to the manner of enforcing preexisting rights, their duration or the proceedings to enforce the same, in none of which two cases the provisions of Sec. 135 relative to the recognition of the paternity of natural children are comprehended, because it is evident that the recognition affects the very existence of the right, as it is the act which determines it in favor of the son who by reason of his birth be capacitated to be recognized."

In the decision of April 11, 1906, which was rendered in a case in which the question of prescription of the action of filiation was concretely discussed, in relation to persons born prior to the regime of the Civil Code; it was clearly proclaimed that:—

> "The exercise of an action seeking to recover from the Courts a declaration of paternity, cannot be controlled by the provisions of sec. 137 of said Code, because with that, the right of the natural son would result diminished and impaired."

Said decision reads as follows:—

> "When it is treated as in the present case of a natural son whose rights are regulated by the Law 11 of Toro, and it appears that

it was considered and estimated by the trial court that those rights have been recognized by the father prior to the publication of the present code, the application of the Rule 1 of the Transitory Provisions of that legal body, in all its entirety becomes imperative without it being possible to understand as restricted the exercise of the action tending or seeking to obtain from the Courts the sanction of such recognition by the provisions of Sec. 137 of the said Code, inasmuch as the very Rule 4 of the Transitory Provisions provides that the rights originated and not exercised before the regime of the Code shall subsist in the extension and under the terms which the prior legislation recognized; and it would be an injury to the right thus recognized of the natural son in all its obliged extension and its efficaciousness, when * * * * it be given to the 4th Rule Transitory the interpretation which the appellant pretends. * * *"

In the decision of December 28, 1906, it was said by the Court:—

"The substantivity of the right which the law 11 of Toro recognizes in favor of the child who has the conditions established therein to consider himself as a natural son has no limitation of time to exercise his action, and in consequence it is clear that the complaint brought under said legal provisions has been brought in time and form under the prescriptions of Rule 1 of the Transitory Provisions of the Civil Code, according to which the rights born and not exercised shall be regulated, in accordance thereto, although the Code does regulate the same in other manner or does not recognize them all; which provision excludes the application to this case of Art. 137 of said legal body,

> which should be understood as limited to the exercise of the rights born after its publication." The same doctrine is clearly supported in the decision of April 2, 1907.

In the case of Curtis *vs.* Whitney, 13 Wall. (U. S.) 68, this Hon. Court said:

> "If there was no limitation of time in force when a party's right of action accrued or his contract was made, neither the right nor the obligation of the contract is impaired by a statute which compels him to sue promptly or abandon his claim."

We beg to repeat that our discussion of this point is only based on the possibility that it might be considered that our action is one in which the paternity of Ramón Calaf by Salvador Calaf is to be proven. We emphatically deny that that was the case, we had no necessity to appeal to the Courts for a judicial recognition, since we had a voluntary one, which was made in person by the father and in a manner which appeared to the trial judge satisfactory and conclusive.

We beg to call the attention of the Court to the Amendment introduced in the Civil Code by the Legislature of Porto Rico by the Law No. 73, approved March 9, 1911, by virtue of which the provisions of the Civil Code of Spain which had been in force in Porto Rico, from 1889 to 1902, embodied in Sec. 135 and 137 of that Code, have been adopted again by the Legislature. Those provisions are as follows:

Sec. 1, Chap. 3 and 4, Title 7, Book 1, comprising 187 and subsequent Sections up to 197 of the Civil Code of Porto Rico, are hereby amended in the following manner. . . . .

. . . "Art. 193; Natural children are those born out of marriage of parents who at the time of the conception could be married with or without dispensation. A natural child may be recognized by the father or mother jointly, or by only one of them, in the inscription of birth or in any other public document. The father is obliged to recognize the natural child:

1. When an indisputable paper written by him expressly acknowledging his paternity is in existence.

2. When the child is in uninterrupted enjoyment of the status of a natural child of the said father, justified by direct acts of the said father or of his family;

3. When the mother was known living in concubinage with the father during her pregnancy and at the time of the birth of the child.

4. When the child may present authentic proof of the paternity of the father." . . .

"Art. 194. 'The actions for the recognition of natural children can be instituted only during the life of the presumed parents or one year after their death, except in the following cases:

1. If the father or mother died during the majority ofthe child, in which case the latter may institute an action before the expiration of the first four years of his majority.

2. If, after the death of the father or mother, some document before unknown should be discovered in which the child is expressly recognized."

In this case the action must be instituted within six months following the discovery of such instrument."

The foregoing amendment is an indication of the will of the Legislature of Porto Rico to continue the old principles of the Spanish jurisprud-

ence in force up to 1902 in regard to the matter of natural children. We assume that under these provisions the question of prescription has been so modified as to practically make the action imprescriptible, as the finding of any document showing recognition at any time entitles the child to bring the action within six months thereafter.

## Conclusion.

The laws and jurisprudence established by the Supreme Court of Spain had full force in Porto Rico up to the date of the change of sovereignty. Said change took effect almost ten years after the Civil Code had been promulgated in the Island. Had a case as this one been brought between 1889, the year in which the Code went into effect, and 1899, the year in which the cession of Porto Rico by Spain to the United States was perfected by the Treaty of Peace, there could be nothing to prevent the application of the principles of jurisprudence and legislation which we have invoken herein. The Civil Code was left in full force by Sec. 8 of the Organic Act, usually called the Foraker Act, approved April 12, 1900. Said Section of this act provides:

> "That the Laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as ordered or modified by military orders and decrees in force when this Act shall take effect, in so far as the same are not inconsistent or in conflict with the statutory laws of the United States, not locally inapplicable, with the provisions hereof, until altered, amended, or repealed

> by the Legislative authority hereinafter provided for Porto Rico, or by the Act of Congress of the United States."

The provisions of the Civil Code had not been modified in regard to the rights of natural children by any decree or military order at the time that the Organic Act went into force. Neither were the same amended until 1902, when the Legislature of Porto Rico made a revision of the Civil Code, and the provisions concerning natural children were suppressed. The only legislation which, by virtue of such suppression, was left in force was the prior legislation, that is law 11 of Toro, in so far as it was not in conflict with the new Code. The Transitory Provisions of the former Code were left substantially in full force, and Rules 1 and 4 were literally left unchanged. No provision in conflict with the Sections of the former Code relating to natural children were enacted between 1902, the date of the revision of the Code, and 1911, the year when those provisions, as contained in the former Code, providing for voluntary and compulsory recognition of natural children, were substantially reenacted. The Porto Rican Supreme Court had followed until 1903, in the case of Aviles vs. Lange, and Rivera vs. Borrero, quoted hereinbefore, the jurisprudence as established by the Supreme Court of Spain, on the matters involved in this case. We cannot see the reason for a deviation from the old historic construction and the abanddoning of the ways and the channels through which the jurisprudence had gone for centuries, when no change in the law would justify it, and when, on the contrary, our Legislature shows

expressly its intention and desire to continue through those ways and channels. Therefore, we respectfully pray that for the reasons stated, the decision of the Supreme Court of Porto Rico be repealed, and the judgment of the District Court of Arecibo sustaining the Complaint be confirmed.

Respectfully submitted,

MANUEL RODRIGUEZ-SERRA,—CHARLES HARTZELL,
Counsel for Appellants.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

---

## No. 199.

---

ROSA MARIA CALAF Y FUGURUL ET AL.,
APPELLANTS,

*vs.*

FEDERICO CALAF Y RIVERA, APPELLEE.

---

## SUPPLEMENTAL BRIEF FOR APPELLANTS.

---

### Form of Recognition.

The private document by which Salvador Calaf made the recognition of his son, Ramón, meets all the conditions which were mentioned in the opinion of the Porto Rican Supreme Court in the cases of Amsterdam *vs.* Puente (16 P. R. R., 527), Justo Puente y Amsterdam *vs.* Felix Puente y Solana *et al.*, decided in June 18, 1910, and Gual *vs.* Bonafoux, and Cordova *vs.* Folguera, 227 U. S., p. 375. It is *authentic, shows the willingness of the father of giving to his son the status of a natural son, shows that the recognition of Ramón was made voluntarily and solemnly, without room for doubts, and that a record thereof remained.* It was a private document, true, but it was found authentic by the trial court.

The Law 11th of Toro included all forms in recognitions. All the commentators of Spanish Civil Law, in discussing the reform introduced for the first time in the Civil Code, requiring recognitions of children to appear in a notarial or public instrument, note that the Code altered the former legislation in a restricted sense by establishing special forms not required before. In volume 8, pages 156 and 157, of the "commentaries" of Q. Mucius Scaevola, it is said: "Between one and the other (recognitions) there is this difference: the recognition prior to the Code was vested with a character of *generality*, as it could be either express or tacit, and could be justified by any legal means of proving facts, while the recognition required by the Code has a character of specialty, because it should be express, and is to be proven by special and determined proofs."

It is a true fact that the greater part of public documents are authentic, but there are some which are not so. As Scaevola, volume 20, page 206, of his commentaries says: "More properly should many private documents be considered as authentic than those authorized by a public officer," because "authentic is that which proceeds from the person referred to"; so, a note, when signed by the same one who confesses a debt, is as authentic as a letter when it was written, or, at least, signed, by a person who addressed it to another." If a document is authentic, it is also self-evident, or "faith-making," because it produces faith, or is evidence against the person who wrote or signed it. There can be no difference under Gual *vs.* Bonafoux between the private paper in which the recognition of Ramón Calaf was made and an authentic document executed before a notary; once it has been proven to the satisfaction of the trial court that our document is genuine, and therefore, authentic and self-evident (*fe haciente*—faith-making), it has the same effect and efficaciousness as a public document.

Under the Civil Code, the acts relating to the civil status of persons shall be recorded in the registry devoted to that purpose (section 318), and the records in the registry shall

be evidence of the civil status, and any other evidence can be admitted only when such records have never existed, or the books of the registry should have disappeared, or when a litigation is instituted before the courts (section 320). The civil registry was not in existence in 1840, when Ramón Calaf was born. Among the parochial books of baptisms existing in the archives of the Cathedral Church of San Juan, Porto Rico, is not found the original book containing the records of baptism corresponding to the years 1840-1841, although there exists a book which is said to be a copy of the original and which does not contain the certificate of baptism of Ramón (Statement of Facts, pages 34 and 35 of Record). Such books were the only record of the civil status at the time. It is the essential fact of the present litigation that there was a recognition made in writing, voluntarily, without room for doubt, and, therefore, even admitting that the present provisions of the Code should control this case, under said section 320, the private document in question should have been admitted as pertinent evidence to prove the fact in dispute.

Under section 18 of the Civil Register Law, which merely is a reproduction of the old law in force since 1880, such acts modifying the civil status of persons, as legitimations, acknowledgments of illegitimate children, etc., shall be recorded on the margin of registrations of births. And section 63 of said law reads as follows:

> "Documents presented for registration and annotation in the books of the register must be authentic; and when they are from a municipality different from that of the register in which the registration is made, *they must be authenticated before a notary public.*"

That is to say, this section requires the authentication before a notary, the officer who usually authorizes such acts in Porto Rico, only when the documents presented for registration come from a different municipality, not when they come from the same place where the register is located. A

document, as the one in question, can be presented to the officer of a civil register, under the above section of the present law, and, if the officer in charge is satisfied of its authenticity, because he knows the signature or the handwriting, he will make the entry. Our document could have been, and perhaps it was, delivered by Salvador for such a purpose, so that the recognition might appear in the registry book of confirmations, and so that it could produce the same effects in the recording of the baptism.

If the language of the court below meant, in referring to "authentic, solemn, and self-evident" documents, what in our legal term is called a public document, then a recognition made under the Law 11 of Toro before a notary, or even in the record of baptism, would not meet such requirements. Such a document could not be considered as *indisputable*, but would be only *prima facie* evidence—that is, subject to be contradicted and overcome by other evidence (section 11 of Law of Evidence of P. R.). Under section 100 of said law, a presumption (unless declared by law to be conclusive) may be controverted by other evidence. Section 101 mentions what presumptions, and no others, are conclusive. It does not include public documents, but it contains this conclusive presumption in paragraph 2:

> "The truth of the facts recited, from the recital in a written instrument between the parties thereto or their successors in interest by a subsequent title."

And section 35 of said law reads:

> "In conformity with the preceding provisions, evidence of the following facts may be given upon trial:
> "1. The precise fact in dispute (herein the existence of a voluntary, authentic, doubtless clear and solemn, recognition).
> "2. The act, declaration or admission of a party as evidence against such party (herein the act of recognition by Salvador as evidence against his will).
> "3. ——.

"4. The act or declaration, verbal or written, of a person deceased or out of the jurisdiction of the court, in respect to the pedigree, birth, parentage, age, marriage, death, or relationship of any person related by blood or marriage to such person; the act or declaration of a deceased person done or made against his interest in respect to his property (herein the act of recognition by Salvador Calaf, deceased, against his interest, *of* that of his successor)."

Finally, under section 1196 of the Civil Code:

"Entries, registries, and *private papers* shall be evidence against the person who has written them in all that may appear clearly stated; but a person who wishes to make use thereof is bound to accept them also in the part prejudicial to him."

The facts in the case of Cordova *vs.* Folguera y Rys *et al.*, 141 and 160, 1912, are not similar to the facts in the present case. No solemn, authentic, voluntary recognitions were alleged there as are alleged and have been proven here. Acts tending to establish paternity, but not an actual, undoubted recognition, were those described in the complaints in said cases, whereas in our complaint the recognition is alleged as having taken place in the solemn acts of conferring upon Ramón Calaf the sacraments of Baptism and Confirmation, the recording of which was, indeed, at the date of his birth and for years afterwards, the only mark, the only recorded memory, of his appearance in the world.

*The Certificate of Confirmation.* We do not question that a mere certificate of baptism or confirmation is not sufficient to establish the recognition of a natural son. But if it be related—as in this case it must necessarily be—to the private authentic document, in the relation of cause to effect, it would be an evident demonstration that the recognition was recorded in a public document, which character cannot be denied to the parochial books and records, prior to the establishment of the Civil Register in Porto Rico. That the

sacramental certificates were public documents is clearly established by the decisions of the Supreme Court of Spain of the 22d of February, 1860, 10th of September, 1864, and others. And that such certificates do constitute, and should be estimated as proof of the recognition of a child when based on any document, even private, authorized by the father, and from which the paternity might be inferred, in relation with the sacrament, was also clearly and conclusively held by the decision of said court of the 10th of November, 1886, in which case there was also a paper in which the father expressed his wish that the child be baptized as his daughter. The value of such document as evidence was discussed, and the court so recognized it.

*Possession of the Status of Natural Son.* The possession of the status of natural son cannot and should not be confounded with the recognition, express or tacit, referred to in Law 11 of Toro. Decision of the Supreme Court of Spain of June 9, 1896. Law 11 of Toro, within the ample scope of an express or tacit recognition, did admit an absolute inquiry of paternity, not permitted by the Civil Code, which restricts it only to the specific cases of section 135, to wit, undoubted written document of the father or continuous possession of the status of natural son (Scaevola, Jurisprudence of the Civil Code, vol. 1, p. 350).

The possession of the status of natural son is characterized by the series of acts presenting a person in a direct and uninterrupted relation, as natural son, with respect to another. Decisions of the Spanish Supreme Court, June 28, 1895; May 21 and November 7, 1896.

> "A person is in possession of the status of natural child of another person, who maintains with him, as such, constant relations, derived from acts of the very father, or of his family, and who passes as such in civil life, thus enjoying the inherent advantages to the fulfillment of the duties which paternity imposes. Dec. March 26, 1904."

Applying to our case those ideas, the direct acts of Salvador Calaf, related in No. 13 of paragraph A of the "Statement of Facts," page 35, Rec., constituted a clear demonstration and corroboration of his true and free recognition of Ramón.

**Res Adjudicata.**

One of the most striking differences between the two complaints is that in the first it was alleged that Maria Antonia Martinez, the mother of Ramón, was, at the time of his birth, a slave. And in the second complaint such allegation was contradicted by asserting that both Salvador and Maria Antonia were free, and could legally marry, justly, without dispensation. The first complaint was clearly demurrable, and one of the grounds of demurrer was precisely that Maria Antonia, being a slave, her son could not have, under Law 11 of Toro, the condition of natural son (pp. 40 and 41 of Rec.).

Besides, in the first complaint, while it was claimed that Ramón enjoyed the status of natural son, no recognition was alleged, as in the second complaint, and such allegation of enjoyment was valueless because he could not have it, legally, for the reason that his mother was a slave and could not marry freely, as required by Law 11 of Toro. The first complaint, prepared without a true knowledge of facts, stated no cause of action, while the second, alleging recognition and all the requirements of said law, was considered as sufficient (pp. 16 and 17, Rec.).

**Inheritable Rights of Plaintiffs from Their Father.**

We are unable to see in the Record any indication that this question was brought or raised in the case. However, we beg to call the attention of the court to a document inserted in page 43 of the Statement of Facts, from which it appears

that plaintiffs were declared the only heirs of Ramón Calaf by the proper court, and that they were therein considered as his natural, recognized children, thus meeting in that way the exception of article 939 of the Civil Code.

Respectfully submitted,

MANUEL RODRIGUEZ-SERRA,
CHARLES HARTZELL,
*Counsel for Appellants.*

WASHINGTON, D. C., *January* 20, 1914.

# Supreme Court of the United States

October Term, 1913.

No. 199

Office Supreme Court, U. S.
FILED
JAN 19 1914
JAMES D. MAHER
CLERK

ROSA MARIA CALAF Y FUGURUL *ET AL.*,
*Appellants,*

*vs.*

FEDERICO CALAF Y RIVERA,
*Appellee.*

# BRIEF FOR APPELLEE

PAUL FULLER,
FREDERIC R. COUDERT,
*Counsel for Appellee*

L. MIDDLEDITCH CO., NEW YORK

# INDEX.


| | PAGE |
|---|---|
| Statement of Case | 1 |
| Facts | 2 |
| Brief of Argument | 8 |
| POINT I. | |
| Was the plea of *Res Judicata* rightly sustained | 9 |
| A. Identity of parties and of issue | 10 |
| B. Judgment on Demurrer good as *Res Judicata* | 19 |
| C. No new cause of action in the case at bar | 22 |
| D. Grounds of Demurrer were radical. The action was barred by every Statute of Limitations | 24 |
| POINT II. | |
| Parol evidence of recognition not admissible in action to recover share of inheritance | 26 |
| POINT III. | |
| Have the plaintiffs any inheritable rights from their natural father Ramon Calaf | 43 |
| POINT IV. | |
| The judgment of the Supreme Court of Porto Rico should be affirmed and the complaint dismissed | 45 |

## AUTHORITIES CITED.

Alcubilla—Dict. of Spanish Administration for 1893, p. 325 ..... 38
Alcubilla—sub. ver. "Hijos Naturales" Vol. VI, p. 15, *et seq.* ..... 40
Art. 118 Sp. Civ. Code ..... 26
Art. 119 Sp. Civ. Code ..... 44
Art. 131 Sp. Civ. Code ..... 29, 38
Art. 137 Sp. Civ. Code ..... 5-9-23-25-45
Art. 140 Sp. Civ. Code ..... 38
Art. 842, 843 Sp. Civ. Code ..... 9-44
Art. 939 Sp. Civ. Code ..... 9-45
Art. 1939 and 1964 Sp. Civ. Code ..... 5
Aurora City *v.* West, 7 Wall., 82 ..... 21
Blackburn *v.* Crawford, 3 Wall., at p. 189 41
Clearwater *v.* Meredith, 1 Wall., at p. 43. 20
Clemens *v.* Clemens, 37 N. Y., at p. 73 .... 21
Cordova *v.* Folgueras, 227 U. S., 375..9-22-37-41-43
Cromwell *v.* County of Sac., 94 U. S., at p. 353 ..... 21
Decree of 16 April, 1864 ..... 39
Decree of 28 June, 1864 ..... 39
Decree of 20 April, 1892 ..... 38
Goodrich *v.* City of Chicago, 5 Wall., 566. 21
Gonzalez *v.* Mendez, 15 Porto Rico, 682 17
Gual *v.* Bonafoux, 15 Porto Rico, p. 545.. 19-37
Johannessen *v.* U. S., 225 U. S., p. 238... 10
Law of Toro (re-enacted in the Novisima Recopilacion of 1805) ..... 25
Ley de Toro X 1 (A. D., 1505), re-enacted in Novisima Recopilacion A. D. 1805. 27
Matienso *v.* Morales, 16 Porto Rico, 553. 38
Oramas *v.* Oyanguren, 19 Porto Rico.... 22
Pabernard, June 28, 1864 ..... 41
Palanco Montillo *v.* Palanco, April 16, 1864 ..... 41
Rijos *v.* Folgueras, 16 Porto Rico, at p. 595 ..... 25

Scaevola's Civil Code Annotated ..... 41
Sec. 189 and 1840 Rev. Civ. Code of Porto Rico ..... 5
Sec. 199 Rev. Civ. Code of Porto Rico.... 26
Sup. Ct. Sp. 10 May, 1880..... 39
Sup. Ct. Sp. 1 April, 1886..... 40
Valdeverde *v.* Seravia, 13 June, 1862.... 41
Villedar *v.* Ruis Izquierdo, 24 Feb., 1865. 41
Wilson's Ex. *v.* Deen, 121 U. S., at p. 533. 21

**SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1913.

No. 199.

ROSA MARIA CALAF y Fulgurul and others,
Appellants,

vs.

FEDERICO CALAF y Rivera,
Appellee.

## BRIEF FOR APPELLEE.

### Statement of Case.

This is an appeal from a judgment of the Supreme Court of Porto Rico of February 14th, 1911, reversing a judgment of the District Court of Arecibo and dismissing the complaint in an action brought to annul the Will of Salvador Calaf, to declare him intestate, and to give to the plaintiffs a share of his estate on the ground that they were the descendants of Ramon Calaf whom they alleged to be a recognized natural son of Salvador (Rec., pp. 12 and 28).

The Supreme Court held:

(1) That in a prior action brought by the plaintiffs against the defendant herein to procure a decree that Ramon was such recognized natural son, the complaint had been dismissed without leave to amend, upon a demurrer to the complaint on the ground that it did not state a cause of action, and that it appeared from the com-

plaint that the action was barred by the Statute of Limitations; that such judgment was outstanding and in force, and was *Res Judicata* upon the foundation of the present action.

(2) That the evidence introduced at the trial to establish the status of Ramon consisting only of parol evidence tending to show the paternal relation of Ramon to Salvador was inadmissible in an action to enforce rights of heirship; that in such an action the status of a natural son upon which plaintiffs' claim rested could only be shown by a judicial decree establishing such status, or by the production of an authentic public instrument self-probative and conclusive.

It is the soundness of these rulings which is to be passed upon.

A further point at issue is whether the plaintiffs, themselves illegitimate children of Ramon Calaf, succeeded to any right of action which he might have had to acquire the status of a natural son. Ramon was born in 1840, died in 1895. Long prior to his death any right of action was extinguished. Moreover, the law does not confer any right of inheritance to the illegitimate children of an illegitimate.

**Facts.**

The plaintiffs claiming to be, respectively, natural children and grand-children of Juan Ramon Calaf brought their action against Federico Calaf, a duly recognized natural son and legatee of Salvador Calaf, to annul his institution as heir of Salvador made in the latter's will under date of March 24, 1902, and to have the intestate succession of Salvador opened.

The allegations of the complaint are, summarily, as follows:

That Juan Ramon Calaf was born in 1840, his

father being Salvador Calaf and his mother Maria Antonia Martinez; that his parents were of marriageable age, of free condition and with the legal capacity to contract matrimony; that Salvador Calaf upon the occasion of the baptism of Juan Ramon Calaf, and of his confirmation, recognized the said Juan Ramon as his natural son, and he was held and considered during his whole life as a recognized natural son; that Juan Ramon died on the 9th of October, 1895, leaving as natural children the four first named plaintiffs, and the mother of the plaintiff Cesar Velazquez Calaf, the mother having since died (Par. III, IV and V, Rec. pp. 1 and 2).

That the defendant Federico Calaf was a natual son of Salvador, duly recognized as such by his father Salvador by means of a notarial deed executed on the 17th day of June, 1890, Salvador being at the time forty-five years of age. That Federico, thus recognized, lived with his said father and continued to live with him up to the time of his death on the 11th of February, 1903 (Par. VI, Rec. p. 2).

That by Salvador's will, duly executed on the 24th of March, 1902, he instituted as his only and universal heir, his duly recognized natural son the defendant Federico Calaf (Par. VII and VIII, Rec. p. 2).

That Federico has, since the death of his father, Salvador, been in the full possession of all the property and estate left by his father at the time of his death (Par. IX, Rec. p. 2).

Upon these allegations plaintiffs prayed judgment declaring the institution of Federico as heir by Salvador's last will of March, 1902, to be null and void, and that "as a consequence of such declaration" the intestate succession of Salvador be opened (Rec., pp. 2 and 3).

A demurrer having been interposed and over-

ruled with leave to answer, the defendant interposed his answer (Rec. p. 9) denying that Juan Ramon the plaintiffs' intestate was the son of Salvador Calaf; that his mother Maria Antonia Martinez was of free condition at the time of his conception and birth; that Juan Ramon was ever at any time recognized by Salvador as his natural son or was ever during his life held or considered as a natural recognized son of Salvador. (Rec., p. 10).

The answer further averred:

That Juan Ramon Calaf (the ancestor of plaintiffs) died in the year 1895 when he was more than fifty years of age, and died in the full enjoyment of his mental faculties (Rec., p. 10); that a prior action was brought by the plaintiffs against the defendant Federico in March, 1906, alleging their relationship to Salvador Calaf, claiming in that capacity from Federico one-half of the estate left by Salvador; that a demurrer was interposed to the complaint in that case and a judgment rendered in said action on November 28th, 1906, sustaining the demurrer and dismissing the complaint without leave to amend; that from this judgment no appeal or other recourse had been taken, and it remained in full force and effect. That by said judgment it was declared that plaintiffs' intestate Juan Ramon did not have the status of a natural recognized son of Salvador, which fact is the foundation of the cause of action in the present case and was decided and adjudged against the plaintiffs in the judgment recited. (Rec., p. 11).

The grounds of the demurrer upon which the prior judgment was rendered included, among others:—

(1). That the complaint did not allege facts

sufficient to constitute a cause of action, in particular because the facts alleged were not such as to establish the status of a natural son for their ancestor Ramon Calaf; and

(2). That under Article 137 of the Civil Code in Spain the action could only be brought during the lifetime of the putative parent unless upon certain exceptions not alleged, but negatived by the other allegations of the complaint (Rec., p. 40, and p. 41, fol. 67).

(3). That the Statute of Limitations had barred the action (Rec., p. 43), and

(4.) That the children of a natural child had no right of representation (Rec., p. 42).

The answer further pleaded the Statute of Limitations as a bar to the cause of action, both under Art. 137, 1939 and 1964 of the Civil Code in force in 1890 and §§189 and 1840 of the Revised Civil Code of Porto Rico of 1902, (Res., p. 11).

The District Court of Arecibo rendered a judgment in favor of the plaintiffs (the present appellants) in the following words:

> "That the fact and the law are in favor "of plaintiffs, and against defendant, and "that, therefore, it is proper to declare, and "the Court hereby so declares, that Clause "VIII of the testament of Salvador Calaf "Serra, executed before notary Don Fran-"cisco I. Nater y Rivera, on the 24th of "March, 1902, by which Federico Calaf "Rivera was instituted an heir, is null and "void, and has no legal value or effect, and "that the defendant should pay the costs of "this litigation." (Rec., p. 12).

On appeal to the Supreme Court of Porto Rico this judgment was reversed, and the complaint dismissed, on the 14th of February, 1911 (Rec., p. 28), "for the reasons stated in the opinion." (pp. 13 to 27, Rec).

An appeal having been allowed to this Court and taken, the plaintiffs-appellants submitted a Statement of Facts in the nature of a Special Verdict (p. 29, Rec.), and filed their assignment of errors. (P. 32, Rec.).

This Statement of Facts (pp. 34 to 44, Rec.) in accordance with the custom seeming to prevail in Porto Rico gives an extended relation of the testimony offered on behalf of the plaintiff (Rec., p. 34), and of the testimony on behalf of the defendant (Rec., p. 36), and finally (Rec., p. 44) states:

> "This Supreme Court finding to be true "the facts marked with Nos. 7, 8 and 9 of "paragraph marked with the letter 'B' and "which constitute the plea of *Res Adjudicata*, "admitted said plea and declined to go into "the discussion and decision as to the force "of several elements of proof brought to the "trial in favor or against the recognition "of Juan Ramon Calaf by Salvador Calaf."

The facts numbered 7, 8 and 9 of paragraph "B" which the Court as above finds to be true (Rec., p. 36) are:

That prior to the beginning of the present action, to wit on the 14th day of March, 1906, an action had been brought against the defendant herein by the heirs of Juan Ramon Calaf, in which they prayed that their ancestor Juan Ramon Calaf be declared a natural son of Salvador and that the defendant be adjudged to deliver to the plaintiffs one-half of the estate left by Salvador.

That in such action defendant interposed a demurrer to the complaint on several grounds therein stated, among others that the complaint did not state facts sufficient to constitute a cause of action and that the action was prescribed.

That in said previous action so begun against this same defendant by the heirs or successors of Juan Ramon Calaf a decision was rendered on the 28th of November, 1906, sustaining the demurrer to the complaint, and dismissing the same with costs and without leave to amend.

The Statement of Facts further finds (Rec., p. 44, fol. 71) that even if the plea of *Res Adjudicata* had not been presented it was evident "that the fundamental fact of the complaint, that "is, the recognition of Juan Ramon Calaf as a "natural son had been already decided finally by "a previous decision in a negative sense, and that "said decision cannot be contradicted or dis-"cussed in the present case."

These are the substantive or "ultimate" facts clearly established by the Statement of Facts of the Court below, and they show that the question of whether or not Ramon Calaf had the status of a natural son which would enable the present plaintiffs to inherit from him, had been adjudicated adversely to such contention by a final judgment.

The Statement of Facts sets forth at length the pleadings in such prior action (Rec., pp. 37 to 43).

The Statement of facts further states (Rec., Paragraph "D," p. 44) that:

> "The action seeking the recognition ought "to have been brought previously or at least "simultaneously to the present one: that "the evidence presented by plaintiff with "reference to the recognition is imper-"tinent because the action brought is not one

"for filiation and recognition of natural son,
"but one for nullity of institution of heir,
"and in this case no other evidence should
"have been admitted than that tending to
"justify that the recognition was established
"in a solemn and authentic form or by a
"judgment"

and no such evidence had been presented.

That if, on the other hand, the present action could be "considered as brought to justify the "condition of Juan Ramon Calaf as a natural "recognized son of Salvador Calaf, then it would "be proper to dismiss the complaint, because the "action had prescribed when the complaint was "filed" (p. 44, Rec., fol. 71).

**Brief of Argument.**

I.—The Court properly sustained the plea of *res judicata* based on a judgment between the same parties dismissing the complaint of these plaintiffs, without leave to amend, in an action seeking a decree declaring that their ancestor Ramon was a natural son (Rec., pp. 25 and 36). The possession of the status of natural son by Ramon Calaf was the foundation of the claims of the plaintiffs to have Salvador Calaf, his father, declared intestate by the annulment of his will, and to share in his estate as his heirs, through their father Ramon.

II.—The Court properly held that parol evidence, tending to show actions of the father which might be interpreted as acknowledging the paternity of Ramon Calaf, was not admissible in an action claiming a share of the father's estate based upon the possession by Ramon Calaf of the status of a natural son. Such status should have

been established by a judicial decree, or by an unquestionable public instrument as a preliminary to the action asserting a right to a share in the inheritance.

III.—The plaintiffs did not inherit from Ramon Calaf any right of action to establish his status as a natural son of Salvador Calaf. Ramon was born in 1840 and died in 1895, without asserting any such right and the right died with him; it only survived him if he died insane or in his minority. (Art. 137, Spanish Civil Code).

The plaintiffs are illegitimate children of an illegitimate. In the absence of legitimate children, acknowledged natural childen are entitled to a share of the inheritance. There is no allegation that the plaintiffs were acknowledged. Rights of natural children are transmissible only to their legitimate descendants (Arts. 842-843 Sp. Civ. Code). In cases of intestacy, in the absence of legitimate heirs, only "natural children, legally acknowledged, succeed to the inheritance" (Art. 939, Sp. Civil Code). There is no proof as to failure of legitimate heirs and no allegation that plaintiffs were legally acknowledged. (Cordova *v.* Folgueras, 227 U. S., 375).

## POINT I.

### Was the plea of Res Judicata rightly sustained.

"The foundation of the doctrine of *res "judicata,* or estoppel by judgment, is that "both parties have had their day in Court "(2 Black Judgments, §§500-504). The gen- "eral principle was clearly expressed by Mr. "Justice Harlan, speaking for this Court in "*S. P. R. R. Co.* vs. *U. S.*, 168 U. S., p. 1-48:

" 'That a right, question or fact, distinctly

"'put in issue and directly determined by
"'a court of competent jurisdiction, as a
"'ground of recovery, cannot be disputed
"'in a subsequent suit between the same
"'parties or their privies.'"
Johannessen *v.* U. S., 225, U. S., p. 238.

**A.** *Identity of parties and of issue.*

There is no question as to identity of parties in the two actions. In both they are the natural children and alleged heirs of Ramon Calaf (Complaints at pp. 1 and 37, Rec.). Two of the plaintiffs named in the earlier action as mentally incapacitated (p. 37, Rec.), had died intestate and without issue according to the testimony offered by the plaintiffs in the present action (p. 43, Rec.).

As to identity of issue, the main fact in issue in both cases is Ramon Calaf's status as a recognized natural son of Salvador Calaf, and the "right" sought to be enforced in either case is the property right flowing from such status.

There cannot be any doubt that the fact put forward in the present suit as a ground of recovery is the fact that Juan Ramon was a recognized natural son of Salvador, and as such entitled to a share in his estate, and this was the fact set up in the earlier case and adjudged against the contention of the present plaintiffs.

The plaintiff (paragraph fifth) alleges that Salvador Calaf recognized the plaintiff's ancestor Juan Ramon as his natural son at the time of his baptism and at the time of his confirmation, and that he was held and considered during his whole life as a natural son recognized by his father. This allegation is the essential basis and foundation for the relief sought in the action, and it was requisite to establish the fact so alleged by proof of an efficient and legal recog-

nition of the plaintiff's ancestor and his acquirement of the status alleged.

It is not necessary for the application of the plea of *Res Judicata* that the precise judgment or relief sought in the second action should be identical with the relief sought in the first, but only as said above by this Court "that a right, question or fact distinctly put in issue" and determined in the earlier action and necessary for determination in the second, should not again be brought in issue.

The "right" invoked in the prior action was the right to the status of a recognized natural son, and to share as such in the estate of Salvador Calaf. This is precisely the right asserted in the present action. The only difference is in the method of statement. In the earlier action, plaintiffs prayed for a decree that they were such natural children and entitled to a share in the estate; in the present action they demand participation in the estate upon the assertion that they are such natural children.

*Allegations in Prior Action (1906).*

That during the minority of said Ramon Calaf, his father, Salvador Calaf Serra, assisted him, though not liberally, *and held and considered his as a son,* attending to the payment of his strict expenses and wants, as well as the expenses of learning his trade and permitting him to use his name (p. 38, Rec.). That said Ramon Calaf *always enjoyed the status and condition of a natural son of Salvador Calaf Serra* (p. 38 Rec.). That* Federico Calaf* has been and is in possession of all the properties &c., &c., * *— has never delivered to plaintiffs totally or in part the Estate of Salvador Calaf &c., &c., (p. 38, Rec.). They pray the courts to render a judgment in their favor declaring that Roman Calaf was a natural son of Don Salvador Calaf and that *as such he had the right to inherit him*

*Allegations in Present Action (1908).*

That said Salvador Calaf Serra recognized the said Juan Ramon Calaf Martinez as his natural son at the time when the latter received the Sacraments of Baptism and Confirmation and the said Juan Ramon Calaf Martinez died in the City of Ponce on the 9th of October, 1895, *having been held and considered during his whole life as a natural son recognized by his father Salvador Calaf Serra* (p. 2. Rec.).

That all the property and estate left at his death by said Salvador Calaf Serra is in the possession of defendant Federico Calaf Rivera, who, since the death of the former, has been in the full possession of all of said properties, enjoying the same and appropriating for himself all of the fruits and products of the same (p. 2, Rec.). Plaintiffs pray the Court to render a

*in the one-half of his estate*; that plaintiffs as the only heirs of Ramon Calaf are entitled to the same rights to which Ramon Calaf was entitled with reference to the estate of Salvador Calaf, and that defendant Federico Calaf should render an account to plaintiffs of the inheritance of Salvador Calaf and the products thereof, after a liquidation, and lastly that *Federico Calaf should deliver to plaintiffs one half of the whole estate left by Salvador Calaf*, and the products thereof since the year 1902, and that he pay the costs of this litigation (p. 39, Rec.).

Judgment against the defendant that the said institution of heir made in his favor and contained in the testament of Salvador Calaf Serra dated March 24, 1902, be null and void *and ordering as a consequence of such declaration that the intestate succession of Salvador Calaf Serra, be opened and that costs be also granted to plaintiffs against defendant* (pp. 2-3, Rec.).

The Supreme Court of Porto Rico considered carefully the identity of action supporting the plea of *res judicata,* and we cite from its Opinion at p. 25 Rec.:

"So we have that it has been already held "and decided according to the terms of the "judgment above mentioned, and with the "character of *res judicata,* that Ramon "Calaf Martinez is not a natural son of Sal-"vador Calaf Serra, and that neither him-"self, nor the plaintiffs in this case, as his "heirs, are entitled to the inheritance of "Salvador Calaf Serra, and that Federico "Calaf Rivera is not under the obligation of "rendering any account to plaintiffs of the "inheritance of Salvador and its products, "after liquidation of the same is made, nor "to deliver to plaintiff the half of the estate "left by Salvador Calaf Serra, with the "products thereof since the year 1902.

"Are those declarations covered by the "presumption of *res judicata* in the present "case?

"Article 1219 of the Civil Code in force "says:

"'In order that the presumption of the "'*res judicata* may be valid in another "'suit, it is necessary that between the "'case decided by the sentence and that "'in which the same is invoked, there be "'the most perfect identity between the "'things, causes, and persons of the liti-"'gants, and their capacity as such.'

"There is identity of things in the two "cases to which we refer, because the ulti-"mate end of both is no other than the par-"ticipation in the inheritance of the estate of

"Salvador Calaf; the cause of action is the "same; that is, the recognition as natural "son of Juan Ramon Calaf, which is asked "for in the one case and is taken for granted "in the other; and, lastly, the litigants are "identical, with the only difference that the "minor plaintiff appears with distinct "names in both cases, and in the second suit "José and Adela Calaf do not appear as they "did on the first one, for the reason that "both had died (p. 43, Rec.), and had been "succeeded in their rights by the plaintiffs "in the second case, as appears from the "record.

"If the present complaint be successful, "the principal ground of the judgment "would be the recognition of Juan Ramon "Calaf as natural son of Salvador Calaf, "with the consequential rights to such a "recognition, and the judgment would con- "tradict and destroy the effect of the previ- "ous final and firm judgment.

"If the plea of *res judicata* be overruled, "we shall always have that the fundamental "fact of the complaint, that is, the recogni- "tion of Juan Ramon Calaf as a natural son, "has been decided by prior judgment in a "negative sense, and such decision cannot "be contradicted nor discussed in the pres- "ent suit, with which the present action "seeking the nullity of the institution of "heir, would be groundless."

The Statement of Facts in the nature of a Special Verdict, which in this case takes the place of the evidence at large, deals with the question of *res judicata* as follows (Rec., fol. 71):

"This Supreme Court, finding to be true

"the facts marked with Nos. 7, 8 and 9 of "paragraph marked with the letter 'B' and "which constitute the plea of *Res Judicata* "(Rec. p. 60), admitted said plea and de- "clined to go into the discussion and de- "cision as to the force of several elements "of proof brought to the trial in favor or "against the recognition of Juan Ramon "Calaf by Salvador Calaf, and, in addition, "the court established that although the ex- "ception of *Res Judicata* had not been made, "it would also result that the fundamental "fact of the complaint, that is, the recogni- "tion of Juan Ramon Calaf as a natural son, "had been already decided finally by a prev- "ious decision in a negative sense, and that "said decision cannot be contradicted or "discussed in the present case."

Nos. 7, 8, 9 of Paragraph B, are at p. 36, Rec. and pp. 6 and 7 of the present Brief.

The earlier action is an action of filiation, praying that Ramon be adjudged a natural son, and as a consequence of such judicial recognition, that plaintiffs' rights to the inheritance of Salvador be adjudged, and that the instituted heir Federico account to them for one-half of the estate.

The second part of this relief is the equivalent of the relief prayed for in the present action—to wit the nullification of the institution of heirship in favor of Federico, and the opening of Salvador's estate as that of an intestate, which would make Ramon co-heir with Federico.

The present action and the relief sought is predicated upon the assumed fact of recognition —which plaintiff failed to establish in the earlier action. The assumption takes the form of an allegation that Ramon was a natural son by reason of his recognition; and the Court is asked to

decree a right of inheritance, based upon an assumption absolutely rebutted by the judgment in the prior action.

This fact of recognition the Supreme Court of Porto Rico holds was *"one of the essential facts of the complaint"* (Rec., Op.—p. 18) to be established by competent evidence. This identity of the "essential fact" with the similar essential fact required to be established in the earlier direct action of filiation, establishes conclusively the identity of the *main issue* in both actions, which is the basis for applying the rule of *"res judicata."* Not only was it the main issue in the action for filiation, it was practically the *only issue*, in *both* actions, for that issue once determined in plaintiff's favor, the accounting of Federico for the estate, or the opening of the intestate estate, was a subsidiary and necessary result.

The "action is precisely based on the existence of such recognition." (Rec., Op. p. 17).

The Supreme Court of Porto Rico in a recent decision rendered on appeal from the District Court of Humacao—*Gonzales* v. *Mendez*—(15 Porto Rico Rep. p. 682), holds that where a judgment between the same parties is pleaded in bar, the plea will be upheld if the object of both suits is the same.

In the earlier action the annulment of a conveyance by a mother, of property of a minor was sought on the ground that the *patria potestad* vested in the mother did not give her the right to make such conveyance without previous authorization of the Court to be had upon proof of the necessity and propriety of the conveyance. Judgment was rendered against the plaintiff. A second action was brought to declare the same conveyance null and void, upon the allegation that the mother was not vested with the *patria*

*potestad* over her daughter, because the latter was emancipated, etc., and the Court held that the validity of the conveyance was *res judicata*, and could not be again questioned by the introduction of other grounds of nullity not presented in the earlier action, although in existence and available at the time it was brought.

In the fifth paragraph of the complaint it is alleged, as we have seen, that Salvador Calaf recognized the plaintiffs' ancestor Ramon as his natural son, and that Ramon had been held and considered during his whole life as a natural son recognized by his father (Rec., p. 2).

This, as already stated, seems to make it clear that the necessary foundation for the relief sought in this action was the establishment of the fact so alleged, to wit: the fact of recognition and the acquisition and enjoyment of the status of natural son. This allegation was directly put in issue by Paragraph IV of the first defense (Rec., p. 10).

But the plaintiffs insist that because the present action is not in the actual words of the prayer for judgment an action of filiation, it is therefore not identical with the former action in which their complaint was dismissed. The former action prayed for a *judicial and enforced recognition* of Ramon as a natural son, based upon the allegations of *actual recognition*. In the present action allegations of *actual recognition* are made although no judicial decree is asked establishing that as a fact, yet judicial recognition of the fact is asked for, in the enforcement of alleged rights flowing solely from such recognition.

Thus the issue of recognition is raised and the relief consequent upon such recognition alone is sought in both cases.

If it be contended that no judicial recognition

is sought in the present case, then there can be no basis for the ultimate relief prayed for, *i. e.*, the enforcement of rights of inheritance. The rights of inheritance can only follow a judicial recognition of the status, or an authentic recognition by the parent solemnly attested and self-probative, but such rights can no more be predicated upon mere parol or inferential recognition, than property rights can be predicated upon similar evidence of testamentary intentions without judicial sanction, and lacking the elements of authenticity required by law.

Either, therefore, the allegation of recognition raises an issue to be determined in the action and requiring proof and judicial sanction to make it operative in creating the status of natural son, and in that event this action is identical in issue and in purpose with the earlier action, or, the plaintiff's case rests upon a mere allegation of a fact, the effect of which has not been judicially determined, and is not to be judicially determined in this action (which plaintiff avers and the Court holds is not an action of filiation). In that event he is not entitled to the relief which can only be based upon judicial establishment of the status, or its creation by authentic and public instrument.

*Gual* v. *Bonafoux*, 15 Porto Rico Rep., p. 545.

**B.** *Judgment on demurrer good as res judicata.*

The prior judgment dismissing the complaint of the same plaintiff against the defendant without leave to amend was rendered upon a demurrer, and the appellant has objected that a judgment upon demurrer cannot be pleaded as *res judicata* in a subsequent action.

That judgments upon demurrers have been successfully pleaded as *res judicata* in subsequent

actions is attested by many decisions of this and other courts.

> "On demurrer to any of the pleadings "which go to the action, the judgment for "either party is the same as it would have "been on an issue of fact, joined upon the "same pleading and found in favor of the "same party."
>
> "And when the defendant's plea goes to "bar the action, if the plaintiff demur to it, "and the demurrer is determined in favor of "the plea, judgment of *nil capiat* should be "entered notwithstanding there may be also "one or more issues in fact; because upon "the whole it appears that the plaintiff had "no cause of action."
>
> Clearwater *v.* Meredith, 1 Wall. at p. 43. quoting from Tidd's Practice and Gould's Pleading.

Judgment rendered against plaintiff upon a general demurrer to the declaration, in a common law action to recover damages against the City of Chicago, held to sustain the plea of *res judicata* in a subsequent suit brought by libel in the Admiralty Court to recover damages arising out of the same occurrence—although the earlier action had proceeded upon the obligation of the City to remove obstructions from the Chicago River and its refusal to take any action in that regard, while the libel charged that the City had assumed and undertaken to remove the obstruction, and did not complete the removal but negligently and carelessly left the obstruction in the river. And although further, in the opinion of the Circuit Court "the facts of the case would sustain the claim made by the libellants, if the

Court was relieved from the embarrassment"——

Goodrich *v.* City of Chicago, 5 Wall., 566.

"A judgment for either party on de-
"murrer to a pleading involving the merits,
"is the same as it would have been on an
"issue in fact, joined upon the same plead-
"ing, and found in favor of the same party."

Aurora City *v.* West, 7 Wall, 82 at p. 101.
Citing, Hopkins *v.* Lee, 6 Wheat, 113.
Young *v.* Black, 7 Cranch, 565.

A decree with regard to the personal status of an individual will be equally conclusive with a decision upon a right of property. * * And it is equally well settled that the mode in which the question is brought before the Court is immaterial if it be actually decided.

Clemens *v.* Clemens, 37 N. Y. at p. 73.

Even where the second action between the same parties is upon a different claim or demand, the judgment in the prior case operates as an estoppel as to those matters in issue or points controverted upon the determination of which the finding was rendered.

It is the matter alleged by the party, and upon which the judgment proceeds which creates the estoppel.

Cromwell *v.* County of Sac, 94 U. S. at p. 353.
Wilson's Ex. *v.* Deen, 121 U. S. at p. 533 following Cromwell *v.* Co. of Sac.

The similarity of the allegations in the two actions, and the identity of the foundation of plaintiff's right in both cases, *i. e.* proof of the status of their father Ramon as a natural child, we submit, are beyond dispute.

In the present case the demurrer upon which the judgment was rendered went to the root of the cause of action.

It was a demurrer on the ground that the facts alleged were not sufficient to constitute a cause of action (Rec., p. 40), and also on the ground that the action was, on the face of the complaint, barred by the Statute of Limitations contained in Art. 137 of the Spanish Civil Code, in force in Porto Rico from 1889 to 1902. The ancestor of the plaintiffs had died in 1895, at the age of fifty-five; Salvador Calaf, his alleged father, had died in 1903, and the earlier action was brought in 1906.

This Court has recently upheld a judgment of the Supreme Court of Porto Rico, dismissing a complaint on the ground that the Statute of Limitations had barred the cause of action, the objection being raised by demurrer.

*Cordova* v. *Folgueras*, 227 U.S., 375.

**C.** *No new cause of action in the case at bar.*

The exception which has been made to the general rule that judgment upon a demurrer is binding as *res judicata* is when the second action is founded upon relevant facts which have arisen since the earlier action was decided, or possibly on facts then in existence, but newly discovered and of which plaintiff was in excusable ignorance at the time of the earlier action.

An example is the case of *Oramas* v. *Oyanguren*, 19, Porto Rico R. Advanced Sheet No. 262, before the Supreme Court of Porto Rico. There an action of filiation had been brought in 1905 by the mother and guardian of a natural child; she failed in her proof and judgment went against her. In 1912, the mother and the putative father being both dead, the infant brought suit through a

guardian *ad litem*, against the heir of Oyanguren, alleging acknowledgement by the father in the years 1910 and 1911, five and six years subsequent to the rendition of the prior judgment.

The court held that this was a new and different cause of action not in existence at the time of the prior action; based upon acts entirely distinct from and subsequent to the rendition of the judgment set up as a bar.

No such exception covers the present case. The only additional fact endeavored to be adduced in evidence was not pleaded; evidence of it was inadmissible, and the fact was irrelevant, as it did not take the cause of action out of the boundaries of the limitation imposed upon the action by the Civil Code.

This fact, not pleaded, was the existence of a paper, without date, unattested by any witness or any formality; supposed to be signed by Salvador Calaf, the alleged father of Ramon, acknowledging that Ramon was his son (p. 35, Rec.). It was not pleaded, evidently being considered simply as an item of evidence, cumulative at best. It was not relevant nor admissible in an action seeking an enforcement of inheritable rights, predicated upon an assumed previous sufficient recognition of the status of an acknowledged natural son.

And it did not come within the permission conferred by Art. 137 of the Civil Code of Spain of 1889, applicable in Porto Rico from 1889 to 1902. This article prescribed that action for acknowledgment of natural children can be instituted only during the life of the presumed parents, except (1) if the parent died during the minority of the child, in which case the child may institute the action within the four years following its majority, and (2) if after the death of the parent "some "instrument before unknown, should be discovered

"in which the child is expressly acknowledged. "In this case the action must be instituted within "the six months following the discovery of the "document."

The action was brought October 13, 1908 (p. 3, Rec.); the document was delivered to Rosa Maria Calaf, according to testimony offered on her behalf, in the year 1907 (p. 35, Rec.).

It was moreover inadmissible in an action to annul the institution of heir and to obtain a share of inheritance,—as will be more fully shown in discussing the question of rejection of evidence.

The only variation, or attempted variation, in the facts which plaintiffs endeavored to establish in the present action and the facts pleaded and held insufficient in the earlier action to establish the status of natural children, was therefore the existence of a document which under the terms of Art. 137 had lost any vitality it may ever have possessed, and constituted no proof.

**D.** *Grounds of demurrer were radical.*

To show how thoroughly the demurrer in the earlier action went to the root of plaintiffs' right to assert any claim as acknowledged natural children, it may be well to call attention to how complete was the bar of the statute of limitations which the demurrer rested upon.

Plaintiffs' ancestor Ramon was born in 1840 (p. 1, Rec.); he lived until 1895, in which year he died (p. 2, Rec. and pp. 35 and 36, Rec.). He did not die during his minority, and there is no allegation and no evidence that he was insane. These are the only cases where the right to bring suit passed to the children of the illegitimate. (Art. 118, Sp. Civ. Code).

During all his time, thirty years after he had attained the full majority of 25 under the Spanish

law, he brought no action to establish his status as a natural son.

His supposed father, Salvador Calaf, survived him eight years, dying in 1903 (p. 2, Rec.) and still no action was brought. Not until March 14, 1906, was an action of filiation brought (p. 39, Rec. p. 36 and p. 44), forty-one years after the alleged natural son had attained his majority, eleven years after his death, and three years after the death of his alleged father.

Under any of the various laws in force from 1840, the date of Ramon Calaf's birth, to 1906 when the action was begun, the statute of limitations had unmistakably barred the action, and the demurrer which was based upon the limitation went to the very foundation of plaintiffs' rights.

(1) The Law of Toro—re-enacted in the Novisima Recopilacion of 1805, provided that "the "right to enforce a personal obligation prescribes "in ten years; and a personal action and the final "judgment rendered therein prescribes in twenty "years."

*Rijos* v. *Folgueras*, 16 Porto Rico at p. 595, affirmed *subnomine Cordova* v. *Folgueras*, 227 U. S., p. 375; so that under this law the personal action of Ramon, who was born in 1840, was extinguished in 1875, ten years after he reached his majority.

(2) Under the Spanish Civil Code, which in 1889, replaced the Novisima Recopilacion, Art. 137, such an action "can be instituted only during the lifetime of the presumed parents," unless the father or mother died during the minority of the child, in which event the child could institute the action within four years after attaining majority.

The father Ramon did not bring suit during the lifetime of his presumed parent; his father did

not die during his minority, and the suit was not instituted within four years of his majority.

(3) Under the Revised Civil Code of Porto Rico of July, 1902, Sec. 199, an action of filiation must be filed "within two years after the child shall become of age." The child in this case was Ramon, who came of age in 1865, thirty-seven years before the law was enacted, and died in 1895, seven years before the statute. Section 199 further provided that if the child "should die in his minority, or in a state of lunacy," the right to bring the action should be "transmitted to his heirs" and a like provision is found in the Spanish Civil Code which preceded. (Art. 118). He did not die in his minority, nor in a state of lunacy, and consequently the right to bring the action was not transmitted to his heirs, and when the action of 1906 was brought, no such right had been transmitted to the heirs who brought it, and the term of five years fixed by this last code provision of 1902, after the death of the natural child, had expired when the suit was brought, and indeed before the law was passed. The law did not operate to resuscitate a right already dead.

See Opinion (pp. 23-24, Rec.).

## POINT II.

**In an action claiming a share of inheritance as an acknowledged natural son, parol evidence tending to show acts of recognition were not admissable.**

The finding of the Court on this point (p. 44, Rec.) is as follows:

> "The evidence presented by plaintiff with "reference to the recognition is impertinent "because the action brought is not one for

"filiation and recognition of natural son,
"but one for the nullity of institution of
"heir, and in this case no other evidence
"should have been admitted than that tend-
"ing to justify that the recognition was es-
"tablished in a solemn and authentic form or
"by a judgment."

Apart from testimony tending to show that Ramon Calaf received aid from Salvador Calaf during his minority, that at his home and barber shop in Ponce, he visited Salvador who treated him as a son, the plaintiff relied upon two documents: (p. 35, Rec.).

A certificate of the confirmation of Ramon Calaf at San Juan, Porto Rico, on March 19, 1847 (he was born in 1840) in which his name was set down as the natural son of Salvador.

A paper undated and unwitnessed, in these words "I recognize as my natural son Juan "Ramon Valentin, and the same shall be effec-"tive as of the day of his baptism—SALVADOR "CALAF," the authenticity of which was disputed (p. 36, Rec.).

The certificate of confirmation does not indicate that Salvador Calaf was present, or in any way acquiesced in its statements.

The supposed recognition was not attested nor witnessed, its authenticity was disputed, no date assigned to it, nor any indication as to where it was signed. It had every characteristic of the most tenuous parol evidence, calling for the utmost circumspection and caution as to its genuineness, and as to its weight, even in a case where it would have been admissible for what it was worth.

Under the Ley de Toro XI (A. D. 1505; re-enacted in the Novisima Recopilacion, A. D. 1805), the status of a natural child was conferred

upon illegitimate issue, provided the father had recognized the child as his own. The law did not prescribe the character of the recognition, thus leaving its sufficiency to be determined judicially in case of dispute or denial. In other words, while all manner of proof of recognition was admissible, it was not of necessity conclusive, and the mere existence of facts tending to show such recognition did not *ipso facto* clothe the claimant with all the successory and other rights, which under the law are granted to natural sons. Such facts were items of proof to be received and weighed by the Court, and which, if sufficient to establish recognition to the satisfaction of the Court, were made the basis of a decree legally establishing the fact of recognition and conferring upon the claimant the status of a natural son.

In the earlier action brought by these plaintiffs in 1906 to establish the fact of recognition and to enforce such recognition by judicial decree, the parol evidence of an unwitnessed and undated paper would have been admissible for whatever it was worth, and would have been an item of evidence to be considered according to its weight and significance.

But in the present case the plaintiffs expressly disclaimed that this was an action to enforce recognition of their ancestor as a natural son, avoiding, by their direct action to secure a share of the inheritance, the bar of the Statute of Limitations wisely provided against actions of filiation or enforced recognition. The action, they insist, is solely one seeking the nullity of institution of heir, and so the court held (18-21 and 44, Rec.). The basis of such an action is obviously a conclusive presumption that the plaintiff has acquired the status of a natural son entitled to inherit from his father. It is admitted in the

complaint that in the year 1890, Salvador Calaf recognized as his natural son the defendant Federico Calaf Rivera, "by means of a notarial deed executed on the 17th of June, before the Notary Don Jose de la Torre in Manati."

It is further admitted that again by his last Will and Testament of the 24th of March, 1902, twelve years later, he "instituted as his only and universal heir his said natural recognized son, the defendant Federico Calaf Rivera" after declaring that he had no children from his marriage (Rec., pp. 2 and 3).

The conclusive presumption upon which claimants demand to share the inheritance of Salvador with a son whom they admit to have been duly and formally recognized by notarial act, could only be established by a self-probative document provided for by the Spanish Code (Art. 131), or by a judicial decree which under the Ley de Toro might be based upon parol evidence.

Parol evidence might have been admissible in an action to obtain a judicial decree of recognition, where a direct issue as to its genuineness or the truth of the fact attested could be made, and moreover, its weight and sufficiency could be considered. Such an action had, as we have seen, already been brought in 1906 and the complaint dismissed without leave to amend upon the grounds, among others, that it did not state facts sufficient to constitute a cause of action.

But as proof of the actual existence of a legal status creating the conclusive and irrebuttable presumption which defendants would be estopped from controverting, parol evidence is utterly incompetent and inadmissible.

The assumption of such legal recognition as shall *ipso facto* endow the claimant with the prerogatives and property rights of a legitimate son

must surely rest either upon an instrument of the putative father, executed with all the evidential safeguards which in every forum protect the transmission of property rights, or in default of such authentic and deliberate act on the part of the putative father, upon the judgment of a Court rendered in an action to establish such status and in which the father shall have had his day in Court.

The jurisprudence of Porto Rico upon this point is uniform and consistent, and in the case at bar the Supreme Court of Porto Rico follows the established rule.

A full quotation from the opinion will be convenient here. The objection to the admission of the evidence is sustained because:

> "one of the essential facts of the com-
> "plaint, the recognition of the filiation of
> "Juan Ramon Calaf by Salvador Calaf
> "Serra, without the action for recognition
> "being brought, and such recognition having
> "been denied as it has been denied by the
> "defendant, * * * the only evidence
> "which ought to have been admitted would
> "have been the public and authentic docu-
> "ment showing such recognition or an execu-
> "tory judicial decision ordering it" (Rec. p. 18).
>
> "In the case of Amsterdam *v.* Puente,
> "which was decided on June 17th, 1910 (16
> "Porto Rico, Rep. 527), we said:
>
> > 'We think that out of the provisions
> > 'of the Civil Code formerly in force, as
> > 'well as from the practice and juris-
> > 'prudence upon the matter, it can
> > 'properly be concluded that without an
> > 'act which in an authentic form shows
> > 'the willingness of the father of giving

'to his son such a status, the son has
'only a right of action to compel the
'father to confer upon him such a status.
'Article 135 of the Spanish Civil Code,
'and 189 of the Civil Code of Porto Rico
'provide the cases in which a father may
'be compelled to recognize his illegitimate
'son. He can only be obliged to make
'such recognition through an action, and
'it may be said that such an action would
'be unnecessary only in those cases in
'which there be solemn acts on the part
'of the father which came to show that
'such an obligation has been fulfilled.
'It is clearly deduced from those arti-
'cles that although a father had exe-
'cuted, as in the present case, a series of
'acts tending to show that a certain per-
'son was his son, it cannot be said, how-
'ever, that he recognized such person,
'within the legal sense of the word
'recognition. If the father could be
'obliged to do it, then it would be neces-
'sary to admit that before being obliged,
'the desideratum has not been obtained.
'Under such circumstances, and until
'there is not a solemn act, or some decla-
'ration from the court, it cannot be said
'that the son has been recognized, nor
'can it be affirmed that he has acquired
'the civil status of a recognized natural
'son.'

"In the case of Justo Puente y Amsterdam
"vs. Felix Puente y Solano, *et al.*, which was
"decided on June 18, 1910, the legal ques-
"tion was discussed as to whether or not in
"the special proceedings for the declaration
"of heirs, provided by the law approved on

"March 9, 1905, evidence could be admitted "to show the recognition of natural filiation, "which evidence had not been admitted by "the Court below, and in deciding the point "we said: (16 Porto Rico, Rep., p. 556.).

'In our opinion the lower court did not 'commit the alleged error. In order that 'appellant in this case be successful in 'alleging her condition of recognized 'natural daughter, and as such to be de-'clared an heiress, it should be necessary 'to show that her recognition had been 'made voluntarily and solemnly by her 'father, without room for doubts, or, that 'having a right to be recognized in accord-'ance with the law, and the father having 'failed to make the recognition in a solemn 'manner, or, refusing to do so, the daugh-'ter had obtained an executory judgment 'in her favor from a competent tribunal, 'after following the proper procedure in 'such a controversy. It has been the con-'stant practice that when the father fails 'to recognize, or refuses to make the rec-'ognition, the son should appear in the 'proper court exercising the action of filia-'tion to obtain from the court that it might 'declare in a judgment what the father 'failed or refused to declare in a solemn 'manner.'

"In the case of Emilia Rijos Cordova *v.* "Teresa Folgueras Rijos, decided on June "21 of the same year, we said: (16 Porto "Rico, Rep., 593.).

'The natural son derives his right from 'the recognition, and in order that the rec-'ognition be understood as made, and pro-

'ducing all of its legal effects, it is neces-
'sary that it be made in a solemn manner
'by the father, with the firm willingness
'of doing it, and that an authentic record
'thereof shall remain. When the father
'executed acts tending to establish his
'paternity which, by themselves did not
'constitute a solemn recognition, and of
'which no authentic and self evident proof
'remained, under the laws of Toro; when
'the cases provided in the old Civil Code,
'Article 137, happened; and when the acts
'referred to in Article 189 of the Revised
'Civil Code shall occur, then it was and it
'is proper to bring the action of filiation,
'and the recognition should appear in the
'solemn executory judgment of a compe-
'tent tribunal. Parents who, in fulfilling
'their duty, wish to transmit to their chil-
'dren their names and property which
'might belong to the children, should cause
'the recognition to appear in an authentic
'manner, a self evident form, such as the
'recording of the birth, or a public docu-
'ment, a will, or a declaration made in a
'solemn form before an officer or tribunal,
'etc., so that the recognized natural son
'might show his condition as such in the
'same manner as the legitimate son.
'When parents fail to make the recognition
'of their natural children in the stated
'manner, then the latter should exercise
'the action of filiation, and obtain a judicial
'declaration of their right.'

"In accordance with the legal doctrine
"stated in deciding the mentioned cases, it
"becomes necessary to exercise the action
"of recognition when the father has not made

"it, or when he refuses to make it, and it can "only be such action prescinded when of "such recognition there is authentic and self "evident proof, or it has been declared by a "judgment from a competent tribunal. "Hence, as in the present case the action of "recognition is not the one exercised, and it "only has been alleged the character or "capacity of Juan Ramon Calaf as a recog- "nized natural son of Salvador Calaf Serra, "as one of the essential facts of the com- "plaint, which allegation, attending to the "legal and grammatical meaning of its "terms, implied a recognition made in a "solemn and authentic form, it is obvious "that all evidence which does not tend to "justify or show a recognition made in such "a form, is inefficacious in law to ends sought "by plaintiffs.

"The testimony of witnesses on the part "of plaintiffs tending to show acts of recog- "nition of the filiation as natural son by Sal- "vador Calaf Serra, with reference to Juan "Ramon Calaf; the document presented by "the plaintiffs, and which was so debated at "the trial, document which does not contain "any date and which reads as follows:

'I recognize as my natural son Juan 'Ramon Valentin and this shall be disposed 'as of the day in which he was baptized.— 'Salvador Calaf.'

"The certificate of the recording of Juan "Ramon Calaf in a book of confirmed, as "has been pretended to show, made in the "the following terms:

'519. Ramon, h. n. (n. s.) of Salvador 'Calaf and Ma. Antonio Martinez—'P. 'Pedro Elias.'

"The declaration of several witnesses "tending to show the authenticity of the first "of the documents cited; and the examina- "tion of the same by chemical and cali- "graphic experts, would be very pertinent "proofs in a suit upon filiation and recogni- "tion of Juan Ramon Calaf; but they are "not such in a case in which filiation and rec- "ognition are supposed to appear in an "authentic and self evident manner, and "which, being uncontrovertible, to a certain "extent, are out of discussion.

"It cannot be admitted that in accordance "with the Law 11 of Toro under the regime "of which Juan Ramon Calaf was conceived "and born, a recognition made in any man- "ner, direct or indirect, not appearing in a "self evident form, can constitute title to "exercise inheritance rights. Such a theory "would be equivalent to hold that the inter- "ested person bringing it is the one called "upon to appreciate which and how many "acts suffice to determine his recognition, "and to interpret the meaning and extent of "those acts, manifestations and words con- "stituting the recognition. Such appreciа- "tion belongs to the judicial authority, in a "controversy upon recognition, and not in "any other kind of controversy. We say "so in order that the debate might be frank "and open with a complaint showing all the "facts constituting the recognition, and re- "serving to the defendant the right to make "a complete defense against such recogni- "tion.

"As the action seeking recognition has not "been the one brought herein, the defendant "has been deprived of his right to oppose, "in this case, the proper defenses against

"such action and therefore he has been
"deprived of a substantial means of defense;
"and the deprivation of such right in the
"case at bar is so important, that the defense
"of prescription would completely bar the
"action seeking recognition, as we will show.

"We repeat that this action being one
"seeking the nullity of an institution of heir,
"there cannot be applied to it legal pro-
"visions relating to the action seeking rec-
"ognition of a natural son; and for that
"reason we hold that as the action seeking
"nullity is based on the recognition of
"natural filiation in favor of plaintiffs, and
"such recognition does not appear in the
"record in a self evident and authentic form,
"the action seeking its declaration ought to
"have been brought previously to, or jointly
"with the action seeking the nullity of the
"institution of heir, in order that the ques-
"tion of prescription could have been alleged
"and decided." (Rec., pp. 18, 19 and 20.)

The ample citations of cases in the foregoing extract from the opinion indicate, as we have said, that the jurisprudence of Porto Rico is well settled upon the question that only in a direct action to procure a decree of filiation of a person born before the enactment of the Civil Code of Spain, can parol evidence of the recognition such as was receivable under the Ley de Toro be admitted; and further that no such evidence is admissible in an action to enforce alleged rights of inheritance of a natural son, based upon an assumed recognition, nor, indeed, in any other action than a direct action to procure a decree of filiation.

In other words, the legal status of a natural son cannot be established collaterally by any such

evidence in a suit to enforce supposed rights of such natural son; in such a suit to enforce the rights of a natural son, the status of the plaintiff must be established by a decree recognizing it, or by an instrument attested in such authentic and self-probative form as to be the equivalent of a decree; in other words, by some conclusive and irrebuttable proof of the fact.

We will, however, cite two other cases from the Porto Rico Courts:

> "The allegation that inasmuch as they "were in the uninterrupted possession of the "status of natural children of Tomas Gual, "there was no need of prosecuting any ac- "tion for their acknowledgment as such "natural children, is of no benefit to the ap- "pellants, for even if such possession was "certain, *it was not enough* for the purpose "of immediately entering upon the enjoy- "ment of their rights attending the legal and "authentic acknowledgment of the natural "filiation."
>
> Gual *v.* Bonafoux, 15 Porto Rico Rep. at p. 552.
> Cited in Cordova *v.* Folgueras, 227 U. S. p. 375.

On demurrer to a complaint praying that the legatees of a testator recognize the share of the plaintiff as a natural daughter in the estate of the testator, based upon an allegation of numerous acts of paternal recognition and the possession of the status or character of a natural child, demurrer sustained on the ground that the complaint did not set forth a cause of action.

> "It is not shown that her said father had "ever acknowledged her in the solemn man- "ner required by law (citing Gual *v.* Bon-

"afoux; Puente *v.* Puente, 15 Porto Rico "Rep., p. 545—16 Porto Rico Rep., 556). "This being so it was first necessary for her "to bring an action of filiation, it being con- "ceded and the complaint showing that the "action brought was for acknowledgment of "inheritance solely and not for filiation."

Matienso *v.* Morales, 16 Porto Rico Rep., p. 553.

The decisions of the Supreme Court of Spain are in accord with this doctrine and establish, moreover, that Sacramental certificates are evidence only of the specific acts to which they relate.

By Art. 140 of the Civil Code of Spain, illegitimate children have the right to claim support if paternity is established by reference to a final judgment in a civil or criminal action or in an indisputable document in which the filiation is expressly acknowledged. This provision is in analogy with Art. 131 which requires the acknowledgment of a natural child to be attested by a public instrument.

In an action for maintenance, the complaint was dismissed and the decree affirmed on the ground that the complainant did not produce the proof required; both the Code and the anterior law —the Recopilacion—requiring an instrument on the part of the father acknowledging his paternity, the purpose being to avoid the perplexity of investigations into paternity, which the Court classes as "one of the mysteries of nature."

Decree of 20 April, 1892.
Alcubilla—Dict. of Spanish Administration for 1893, p. 325.

"The condition of a natural child must "necessarily be based on the acknowledgment

"of the father, voluntarily and legally estab-
"lished, or in the event of failure or refusal,
"in a formal, final judgment to that effect."

Decree of April 16, 1864 (cited 16 Porto Rico, Rep. p. 558).

"The filiation of natural children must
"necessarily be shown by the acknowledg-
"ment of their parents or by the formal
"declaration of a final decision, a mere cer-
"tificate of baptism not being sufficient to es-
"tablish it."

Decree of June 28, 1864 (cited 16 Porto Rico, Rep. p. 559).

"A certificate of baptism stating the pa-
"ternity is not sufficient to establish the
"recognition of a natural son (Supreme
"Court of Spain, 23rd June, 1858, 28th June,
"1864, 29th November, 1886), nor any note
"added to such certificate as there is no au-
"thority to alter or modify such certificates
"once issued, without competent authority."

Decree of 16 April, 1864 (Alcubilla, Vol. VI, p. 15).

"Certificates of the sacraments and cer-
"tificates of death issued by parish priests
"from the books confided to them, constitute
"proof in conformity with Article 280 (pres-
"ent No. 596) of the Law of Civil Procedure
"only of the particular act to which they
"relate and are not of equal value as to the
"mere indications contained in them with
"reference to anterior or separate facts
"which must be established by other and
"concrete proof."

Sup. Ct. Sp., 10 May, 1880.

"According to the unbroken jurispru-

"dence of this tribunal sacramental certifi-
"cates issued with the formalities required
"by law are public documents constituting
"legal proof but only with reference to the
"specific act to which they refer; the certifi-
"cates of birth of the progenitors are indis-
"pensable to establish the filiation of a
"party claiming it and the failure to pro-
"duce any such certificate cannot be sup-
"plied with legal certainty by statements
"contained in other documents relating to
"other parties, even though they be mem-
"bers of the same family."

Sup. Ct. Sp., 1 April, 1886 (Alcubilla, Vol. VIII, p. 625).

To the same effect that neither baptismal certificates, nor memoranda added to said certificates are sufficient to establish the status of a natural child, are the Decrees of 23 June, 1858; 28 June 1864 and 29 Nov. 1886.

Alcubilla—sub. ver. "Hijos Naturales," Vol. VI, p. 15 *et seq.*

In a suit for filiation under *Toro* 11—*Nov. Recop.* Law I, Title 5, Book 10, evidence of implied or tacit acknowledgment was admitted, and the Court, weighing the evidence determined upon its probative value whether an acknowledgment was made out.

But in a suit for participation in an estate, the status of the natural child is not in issue. It is a prerequisite to his right of action; it is averred as an established fact and must rest upon a judicial decree whenever the recognition has not been voluntarily made by the father, and in this latter case, is attested solely by a self-probative or public document.

Valdeverde *v.* Seravia, 13 June, 1862.
Villedar *v.* Ruiz Izquierdo, 24 Feb. 1865.
(From Scaevola's Civil Code annotated.)

Even under the Law of Toro, the distinction between *express* and implied acknowledgment of natural children, and their use in suits for filiation, and in suits to enforce claims to share in the father's inheritance, was recognized and sustained.

Palanco Montilla *v.* Palanco, April 16, 1864.
Pabernard, June 28, 1864.
(From Scaevola's Civil Code annotated.)

And this Court has also held to the same effect, that a baptismal certificate is proof only of the fact of baptism and of its date.

Blackburn *v.* Crawford, 3 Wall., at p. 189.

The necessity of the conclusive establishment of a legal filiation, as a preliminary to any action for a share of an inheritance was passed upon by the Court in the case of

Cordova *v.* Folgueras, 227 U. S. 375.

There the Court says:

"While under the Laws of Toro, the acts of "recognition alleged, although not amounting to a solemn recognition, may have "entitled a natural child to sue for her share "of the inheritance and to prove the acts in "the same suit, the Code requires a preliminary proceeding to prove those acts and to "declare their effect, and limits the time "within which such proceeding can be "brought."

Thus, even under the Laws of Toro, a share of an inheritance could not be claimed without a prior or synchronous proceeding to establish the filiation. The present action has been held, on the contention of the appellees, not to be an action of filiation. As a consequence, the items of conduct tending to show a recognition, are not admissible in evidence. If, on the other hand, the action should be treated as one to establish filiation, and in addition to assert plaintiff's right to share in the inheritance, then the Statute of Limitations would be a bar to it. It was solely on plaintiffs' contention that the action was merely to secure their share of the inheritance upon an assumed filiation, not at issue in the case, that the plea of the statute was not allowed.

The distinction, we submit, is clear between an action of filiation, to compel a negligent or unwilling parent to recognize his illegitimate issue as a natural son, and an action to enforce direct and immediate participation in the estate of an alleged father, deceased, upon the assumption of an accredited and legalized status of natural son.

In the former case, under the law in force at the birth of Ramon in 1840, judicial endorsement of the alleged recognition in an action for that purpose, and the fact of the recognition, could have been proven by parol evidence.

In the second case, where the claim to share in an inheritance is predicated upon an established status, the status must be shown by a decree or by an instrument which admits of no dispute or controversy.

The evidence offered in the case at bar possessed no such attributes and was correctly held by the Supreme Court of Porto Rico to be inadmissible.

The contention of the plaintiffs-appellants is

that although the Statute of Limitations would apply to an action of filiation or for compulsory recognition of a claimant as a natural son, yet it would not be admissible to an action for an accounting, or for the annulment of an institution of heirship based upon an allegation or assumption of a prior recognition.

If this contention is sound, it would dispense with the necessity of any action of filiation and with any authentic recognition. It would deprive the parent of any opportunity of contesting the allegation of filiation or the demand for enforcement of the claim to filiation.

The limitation wisely placed by the law upon the action of filiation would be evaded, and the most important and far reaching domestic relation would thus be imposed without judicial investigation or opportunity for defense, by the mere assumption of fact, based upon hearsay or incompetent evidence, adduced in support of such assumption, long after the putative father's decease and the disappearance of contemporary witnesses, contrary to the cautious and opportune provisions of the law governing a relation so vital to domestic peace and public order.

## POINT III.

**Have the plaintiffs any inheritable rights from their natural father Ramon Calaf?**

Ramon Calaf died in 1895; at that time the Spanish Civil Code of 1889 was in force in Porto Rico; any rights which plaintiffs could inherit from him depended upon the law at that date.

This Court in *Cordova* v. *Folgueras*, 227 U. S., 375 says:

"During the lifetime of an ancestor, no

"heir has a vested right to inherit from him; "that the Civil Code of 1889 confines the "right of natural children to inherit to those "children that are acknowledged, §134, that "is, presumably, to those that are acknowl- "edged as it provides; and since heirs have "only such rights of inheritance as are given "to them by the laws in force at their ances- "tor's death, that there is no reason why "the appellant should take greater ones be- "cause she had been informally acknowl- "edged before 1889."

A. The complaint (Par. III, p. 1, Rec.) alleges that plaintiffs bring the action, respectively: "in the capacity of natural children" and "in the capacity of natural grandson of a natural "daughter" of their ancestor Ramon Calaf.

B. "Natural children are those born out of "wedlock of parents who at the time of the con- "ception of the child, could have married, with "or without dispensation." *Art.* 119, *Sp. Civil Code; in force in Porto Rico until 1902.*

In other words they are illegimate children, of a certain grade, capable of legitimation. The same Article 119, provides: "Only natural chil- "dren can be legitimatised."

C. In prescribing the rights of illegitimate children of a testator the same code provides:

"Art. 842: When the testator leaves no "legitimate descendants or ascendants, the "*acknowledged* natural children shall be en- "titled to a third of the inheritance."

"Art. 843: The rights granted natural "children by the foregoing article are trans- "mitted on their death to their *legitimate* "descendants."

Among the provisions for distribution in cases of intestacy is:

"Art. 913. In the absence of testamentary "heirs, the law gives the inheritance, accord- "ing to the rules hereinafter set forth to the "legitimate and natural relatives of the de- "ceased. * * *

"Art. 939. In the absence of legitimate de- "cendants and ascendants the natural chil- "dren *legally acknowledged*, and those legiti- "mized by royal concession, shall succeed to "the entire estate of the deceased."

There is no allegation that plaintiffs were legally acknowledged by their father Ramon Calaf, to whose right of action they assume to have succeeded.

D. Ramon was born in 1840; died in 1895 while the Spanish Code was in force and had been in force for over five years; his right of action had expired before his death; at his death he possessed no right transmissible to his heirs.

Art. 137, Civil Code, provided that the action could only be brought during the lifetime of the parent, or if he died during the minority of the child, within four years after the child attained its majority. Ramon Calaf died before his supposed father, having never asserted his right of action.

**POINT IV.**

**The judgment of the Supreme Court of Porto Rico should be affirmed and the complaint dismissed.**

Respectfully submitted,

PAUL FULLER.
FREDERIC R. COUDERT,
of Counsel for Appellee.

New York, 5 January, 1914.

8

# Supreme Court of the United States

October Term, 1913.

No. 199

Office Supreme Court, U. S.
FILED
JAN 19 1914
JAMES D. MAHER
CLERK

ROSA MARIA CALAF Y FUGURUL *ET AL.*,
*Appellants,*

*vs.*

FEDERICO CALAF Y RIVERA,
*Appellee.*

# APPELLEE'S BRIEF IN REPLY

PAUL FULLER,
FREDERIC R. COUDERT,
*Counsel for Appellee*

L. MIDDLEDITCH CO., NEW YORK

**SUPREME COURT OF THE UNITED STATES.**

Oct. Term, 1913, No. 199.

Rosa Maria Calaf y Fulgurul, *et al*,
Appellants,

vs.

Federico Calaf Rivera,
Appellee.

## APPELLEE'S BRIEF IN REPLY.

### I.

There is no question that under the Laws of Toro, a decree of filiation could be had in a direct action for that purpose, upon proof of the recognition of the child by the father, supplied to the satisfaction of the Court, "by any other "means allowed by law, acording to the juris-"prudence established by the Supreme Court" (Applt. Brief, p. 11). The cases cited are evidently in actions of filiation. But this is not such an action. This is an action, to quote the words of Appellants' Brief, p. 6, in which hereditary rights * * * are demanded * * * "Based "on the assumption that such recognition and "filiation actually existed."

This Court in *Cordova* v. *Folgueras*, 227 U. S. 375-378, affirmed a judgment of the Supreme Court of Porto Rico, holding that:

> "In order to enforce the rights of a "natural child when there was not a solemn "recognition, but only acts tending to estab-"lish parternity under the Laws of Toro, an

"action of filiation must be brought as re-
"quired by Arts. 133 and 137 of the Code."

This is in accord with the Opinion below cited on p. 16 of Appellants' Brief, and with the finding at p. 44 of the Record.

## II.

**A.** The fundamental fact in the earlier case was that Ramon Calaf was a natural son, recognised as required by the Law of Toro, and the relief demanded was that he should be so adjudged and that as such he had a right to inherit one-half of Salvador's estate (Findings, Rec., p. 39).

In the present action the fundamental fact, upon which is based plaintiffs' claim that Salvador be declared intestate so that they may share in his estate, is the fact which they sought to have adjudged in the earlier action, to wit, that Ramon had been recognized by Salvador as his natural son (Rec., p. 2, Appellants' Brief, p. 22).

**B.** As to the judgment not being final but only a decision unrecorded.

The language of the judgment is clear:

> "hereby decides to sustain the said demurrer,
> "that defendant is not obliged to answer the
> "complaint, which is hereby dismissed with-
> "out permission to amend, and with the
> "costs." (Rec., pp. 25 and 37).

The language is similar to that used in the "*Judgment*" in the case at bar, from which the present appeal is pending (Rec., p. 12).

The time to appeal has expired; "no recourse against [it] has been interposed"—(Findings, Rec., p. 36), according to the certificate of the Secretary (Rec., p. 25). An appeal must be taken within one month after entry of judgment (Art.

295 Code of Civil Procedure). It is the duty of the Secretary to enter it within 24 hours (Art. 237 Code Civ. Proc.).

It is a presumption of law, "That official duty has been regularly performed"; and, "That the law has been obeyed"—(Law of Evidence, Act of March 9, 1905; Sect. 102, Subd. 15 and 32; also Opinion Rec., p. 25). The presumption was not rebutted.

**C.** Identity of parties—There is a mere intimation in Appellant's Brief (p. 7) that there was not identity of parties. The identity was complete save that in the earlier two plaintiffs appeared who were *non compos*, and when the second action was brought these two had died without issue, the remaining plaintiffs succeeding to their shares (Findings Rec., pp. 43-44; Opinion Rec., pp. 25 and 26; Compet. in earlier action, Rec., p. 37).

## III.

The bearing of the Statute of Limitations discussed in Appellant's Brief (pp. 31 to 38) is not as a plea in bar to the present case, but to demonstrate how the plaintiffs have escaped it, by not asking for a judgment of filiation, but assuming a filiation as a basis for a share of the inheritance. Its discussion is germane only as showing how completely the demurrer in the earlier action of filiation went to the very foundation of plaintiffs' rights, based as it was upon a Statute of Limitation, which had extinguished any rights to recognition which plaintiffs' ancestor might ever have had.

Respectfully submitted,

PAUL FULLER,
FREDERIC R. COUDERT,
Of Counsel for Appellee.

17 January, 1914.